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ABSTRACT

To assist administrators in understanding procedural due process rights in student discipline, this manual draws together hundreds of citations and case summaries of federal and state court decisions and provides detailed commentary as well. Chapter 1 outlines the general principles of procedural due process rights in student discipline, such as when students are entitled to due process and how much due process to give. Chapter 2 describes the application of due process to specific forms of discipline: suspension for 10 days or less; long-term suspension and expulsion; disciplinary transfer; inschool suspension; class removal; extracurricular activity exclusion; graduation ceremony exclusion; procedural rights for academic decisions; corporal punishment; and school bus exclusion. Chapter 3 details specific elements in prior hearings and the emergency exception, notice types and procedures, hearing timing, access to evidence before the hearing, ensuring impartial decisionmakers, hearing procedures, findings and reasons, and appeal and judicial review. Specific court cases are cited for further reference. (EJS)

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Procedural Due Process Rights in Student Discipline

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An update and revision of the Procedural Due Process section of

School Discipline and Student Rights
by Paul Weckstein

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Procedural Due Process Rights in Student Discipline

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An update and revision of the Procedural Due Process section of

***School Discipline and Student Rights*
by Paul Weckstein**

**Center for Law and Education
Cambridge, Massachusetts**

About This Volume

This manual is an update and revision of Chapters IX, X, and XI. of *School Discipline and Student Rights: An Advocate's Manual*, by Paul Weckstein, which was published by the Center for Law and Education in 1982. Hundreds of additional citations and case summaries have been added. Commentary has been changed or added, as appropriate.

Organization

The organization of chapters and sections follows, for the most part, the structure created in the 1982 volume. The manual cites federal and state court decisions. Where a list of citations appears, the order is as follows: United States Supreme Court, United States courts of appeals (by circuit), United States district courts (alphabetically), and state courts (alphabetically). Within each category, the most recent decision is listed first.

References to other Publications

Inequality in Education is a journal which was published by the Center for Law and Education. Back issues are available from the Center. References to "Clearinghouse" are to the National Clearinghouse for Legal Services, 407 So. Dearborn, Su. 400, Chicago, IL 60605, (312) 939-3830.

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CHAPTER I

GENERAL PRINCIPLES

A. INTRODUCTION

*"...nor shall any State deprive any person of life,
liberty, or property, without due process of law."*

U.S. Const. amend. XIV, §1.

In two 1972 decisions, the Supreme Court considered the applicability of the due process clause of the fourteenth amendment to dismissals of persons teaching at the post-secondary level. See Board of Regents of State College v. Roth, 408 U.S. 564, 92 S.Ct. 2701 and Perry v. Sinderman, 408 U.S. 593, 92 S.Ct. 2694. The Court articulated a general, two-part approach for determining the availability of procedural due process claims. The first inquiry is whether government action adversely impacts a "protected [interest]" in liberty or property. Roth, 408 U.S. at 569-78, 92 S.Ct. 2705-10, Perry, 408 U.S. at 596-603. If a plaintiff satisfies this hurdle, the next step is to identify the form of notice and hearing appropriate in the particular situation. Roth, 408 U.S. at 569-70 and ns. 7, 8; 92 S.Ct. at 2705-06; Perry, 408 U.S. at 603, 92 S.Ct. at 2700.

Two years later, in Goss v. Lopez, 419 U.S. 565, 95 S.Ct. 729 (1975), the Court applied the Roth-Perry approach to school suspensions of up to 10 days. A five-member Court majority held that such suspensions adversely impacted the plaintiff-students' protected "property interests" in education created by Ohio statutes (*id.*, 419 U.S. at 572-74, 95 S.Ct. at 735-36) and their protected "liberty interests" in their "good name, reputation, honor or integrity...." *Id.*, 419 U.S. at 574-75, 95 S.Ct. at 736. The Court noted, as well, possible interference with other liberty interests; *i.e.*, "...later opportunities for higher education and employment." *Id.*

Concluding that the impact of suspensions on protected interests was "not *de minimis*" (*id.*, 419 U.S. at 576, 105 S.Ct. at 737), the Court turned to required procedures. It detailed the form of notice and hearing generally applicable in cases of suspensions of up to 10 days (*id.*, 419 U.S. at 581-84, 95 S.Ct. at 740-41) to avoid "unfair or mistaken findings of misconduct..." (*id.*, 419 U.S. at 581, 105 S.Ct. at 740) and, where the fact of misconduct is not in dispute, to provide a student

"the opportunity to characterize...conduct and put it in what he[/she] deems the proper context." *Id.*, 419 U.S. at 584, 105 S.Ct. at 741.

Two other aspects of Goss are significant. First, the Court ruled that "notice and hearing should precede removal of the student from school" unless a "[student's...presence poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process...." *Id.*, 419 U.S. at 582, 105 S.Ct. at 740. "In such cases, the necessary notice and rudimentary hearing should follow as soon as practicable...." *Id.*, 419 U.S. at 582-83, 105 S.Ct. at 740. Second, the Court noted the possibility that more formal procedures might be required in instances of "[l]onger suspensions or expulsions" or "In unusual situations, although involving only a short suspension...." *Id.*, 419 U.S. at 584, 105 S.Ct. at 741.

The 1976 decision in Mathews v. Eldridge, 424 U.S. 319, 334-35, 96 S.Ct. 893, 902-03 is also generally relevant. There, the Court set forth a three-part standard for determining the requisite procedures applicable, where government impinges upon a protected property or liberty interest.

Much of the material in the remainder of Chapter I and in Chapters II and III addresses in detail themes which Goss and Mathews introduce. Chapter II addresses not only suspension and expulsion, but also other forms of discipline (for example, disciplinary transfer, in-school suspension, and removal from a particular class). Goss and Mathews are relevant in these situations. In each case, the advocate must address whether a protected interest is implicated and, if so, the procedural safeguards applicable. Chapter III discusses, in turn, the various procedural safeguards (for example, notice, access to evidence before the hearing, impartial decision-maker, etc.). In general, decisions involving different forms of discipline are clustered together, with parenthetical explanations including the form of discipline in each case.

There are citations to state decisions construing constitutional provisions and statutes throughout the three chapters. At this time, state claims may be more viable in a particular jurisdiction.

B. WHEN ENTITLED TO DUE PROCESS: Property and Liberty Interests; Parental Rights

Several Supreme Court decisions define the limits of property and liberty interests. Their principles have been applied in a number of lower court decisions.

1. Property Interests

In Goss v. Lopez, *supra*, the Supreme Court wrote:

At the outset, appellants contend that because there is no constitutional right to an education at public expense, the Due Process Clause does not protect against expulsions from the public school system. This position misconceives the nature of the issue and is refuted by prior decisions. The Fourteenth Amendment forbids the State to deprive any person of life, liberty or property without due process of law. Protected interests in property are normally "not created by the Constitution. Rather, they are created and their dimensions are defined" by an independent source such as state statutes or rules entitling the citizen to certain benefits. Board of Regents v. Roth, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709 (1972).

• • • • •

Here on the basis of state law, appellees plainly had legitimate claims of entitlement to a public education. Ohio Rev. Code §§ 3313.48 and 3313.64 (1972 and Supp. 1973) direct local authorities to provide a free education to all residents between five and 21 years of age, and a compulsory-attendance law requires attendance for a school year of not less than 32 weeks. Ohio Rev. Code § 3321.04 (1972). It is true that § 3313.66 of the Code permits school principals to suspend students for up to ten days; but suspensions may not be imposed without any grounds whatsoever. All of the schools had their own rules specifying the grounds for expulsion or suspension. Having chosen to extend the right to an education to people of appellees' class generally, Ohio may not withdraw that right on grounds of misconduct absent fundamentally fair procedures to determine whether the misconduct has occurred. Arnett v. Kennedy, [416 U.S. 134] at 164, 94 S.Ct. [1633] at 1649 (1974) (Powell, J., concurring); *id.* at 171, 94 S.Ct. at 1652 (White, J., concurring and dissenting); *id.* at 206, 94 S.Ct. at 1670 (Marshall, J., dissenting).

Although Ohio may not be constitutionally obligated to establish and maintain a public school system, it has nevertheless done so and has required its children to attend. Those young people do not "shed their constitutional rights" at the schoolhouse door. Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 506, 89 S.Ct. 733, 736 (1969). "The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures--Boards of Education not excepted." West Virginia Board of Education v. Barnette, 319 U.S. 624, 637, 63 S.Ct. 1178, 1185 (1943). The authority possessed by the State to prescribe and enforce standards of conduct in its schools, although concededly very broad, must be exercised consistently with constitutional safeguards. Among other things, the State is constrained to recognize a student's legitimate entitlement to a public education as a property interest which is protected by the Due Process Clause and which may not be taken away for misconduct without adherence to the minimum procedures required by that Clause.

Goss v. Lopez, 419 U.S. 565, 572-74, 95 S.Ct. 729, 735-36 (1975).

A person's interest in a benefit is a "property" interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing. Board of Regents v. Roth, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709 (1972).]

A written contract with an explicit tenure provision clearly is evidence of a formal understanding that supports a teacher's claim of entitlement to continued employment unless sufficient "cause" is shown. Yet absence of such an explicit contractual provision may not always foreclose the possibility that a teacher has a "property" interest in reemployment.... Explicit contractual provisions may be supplemented by other agreements implied from "the promisor's words and conduct in the light of the surrounding circumstances." [A. Corbin on Contracts, Section 562 (1960).] And, "[t]he meaning of [the promisor's] words and acts is found by relating them to the usage of the past." *Ibid.*

• • • • •

Just as this Court has found there to be a "common law of a particular industry or of a particular plant" that may supplement a collective-bargaining agreement, United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574, 579, 80 S.Ct. 1347, 1351..., so there may be an unwritten "common law" in a particular university that certain employees shall have the equivalent of tenure....

• • • •

We disagree with the Court of Appeals insofar as it held that a mere subjective "expectancy" is protected by procedural due process, but we agree that the respondent must be given an opportunity to prove the legitimacy of his claim of such entitlement in light of "the policies and practices of the institution." Sindermann v. Perry, 430 F.2d 939, 943 (5th Cir. 1970).]

Perry v. Sindermann, 408 U.S. 593, 601-03, 92 S.Ct. 2694, 2699-2700 (1972).

[T]he Court has fully and finally rejected the wooden distinction between "rights" and "privileges" that once seemed to govern the applicability of procedural due process rights. The Court has also made clear that the property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money.

• • • •

To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.

Board of Regents v. Roth, 408 U.S. 564, 571-72, 577, 92 S.Ct. 2701, 2706, 2709 (1972) (footnotes omitted).

See:

- Gorman v. University of Rhode Island, 837 F.2d 7, 12 (1st Cir. 1988) (long-term suspension; "[A] student's interest in pursuing an education is included within the Fourteenth Amendment's protection of liberty and property.");
- Rosa R. v. Connelly, 889 F.2d 435, 436, 438 (2d Cir. 1989) (school board imposed expulsion for 180 days without crediting the time student had been out of school following suspension; "[T]he Board's decision to deny credit for time served may very well have constituted sufficient action to amount to governmental deprivation of a property right.");
- Cole v. Newton Special Municipal Separate School District, 676 F. Supp. 749, 751-52 (S.D. Miss. 1987), *aff'd without opinion*, 853 F.2d 924 (5th Cir. 1988) (suspension followed by in-school isolation for remainder of term; in-school isolation may be equivalent to out of school suspension under certain circumstances and may therefore work a deprivation of student's property interest in education);

- Picozzi v. Sandalow, 623 F. Supp. 1571, 1576 (E.D. Mich. 1986), *aff'd without opinion* 827 F.2d 770 (6th Cir. 1987) (student not permitted to re-enroll in law school prior to successful polygraph test or prevailing at administrative hearing in reference to suspected arson; "A public university student has a protected interest in continuing his studies");
- Crook v. Baker, 584 F. Supp. 1531, 1554 (E.D. Mich. 1984) (graduate degree rescinded due to fraud; student had a legitimate claim of entitlement to the degree, giving rise to a property interest), *vacated and remanded on other grounds*, 813 F.2d 88, 97 (6th Cir. 1987) (appellate court assumed, *arguendo*, the existence of a property interest);
- Harris v. Blake, 798 F.2d 419, 422 (10th Cir. 1986), *cert. denied*, 107 S.Ct. 882 (1987) (student required to withdraw from graduate program; payment of tuition to state university creates property interest which entitles student to due process);
- Campbell v. Board of Education, 475 A.2d 289, 297 (Conn. 1984) (denial of course credit and grade reductions, for nonattendance; some form of due process safeguards apply);
- University of Houston v. Sabeti, 676 S.W.2d 685, 687-88 (Tex. Ct. App. 1984) (permanent expulsion for academic dishonesty; attendance at a state university is a protected property interest).

But see:

- Rose v. Nashua Board of Education, 679 F.2d 279, 282 (1st Cir. 1982) (no property right to "suspension-free" school bus transportation);
- Wise v. Pea Ridge School District, 855 F.2d 560, 563 n.3 (8th Cir. 1988) ("In-school suspension does not exclude the student from school and consequently a student's property interest in a public education is not implicated.");
- Edwards v. Rees, 883 F.2d 882, 885 (10th Cir. 1989) (removal of student from class for 20 minutes "did not deprive [him] of a property interest protected by the due process clause");
- Swany v. San Ramon Valley Unified School District, 720 F.Supp. 764, 773-75 (N.D. Cal. 1989) (no protected property right to participate in graduation ceremony; no protected interest in receipt of diploma during period in which student did not satisfy authorized requirement for completion of a course);
- Boynton v. Casey, 543 F. Supp. 995, 1001-02 (D. Me. 1982) (placing student on probation at end of expulsion did not implicate property right or liberty interest);
- Mifflin County School District v. Stewart, 503 A.2d 1012, 1013 (Pa. Commw. Ct. 1986) (no property right to attend graduation ceremony);
- New Braunfels Independent School District v. Armke, 658 S.W. 2d 330, 332 (Tex. App. 1983) ("...reduction of Appellees' six-week grades by three points for each day of suspension has no adverse impact on Appellees' property right to a public education.").

Cf. (cases involving personnel):

- Cleveland Board of Education v. Loudermill, 470 U.S. 532, 538-41, 105 S.Ct. 1487, 1491-93 (1985) (teacher dismissal; although property interests in public school employment are created by state statutes, the interests themselves are not defined by the procedures allowed for in the statute and those procedures must meet minimal federal due process requirements);
- Merrow v. Goldberg, 674 F. Supp. 1130, 1133 (D. Vt. 1986) (teacher's course credits expunged from transcript; "plaintiff can establish a protected property interest in the course credits by proving that his 'understanding of entitlement' to the credits had an objective basis in [the school's] 'policies and practices' of general application.");
- Tarkanian v. National Collegiate Athletic Association, 741 P.2d 1345, 1349 (Nev. 1987), *rev'd on other grounds*, 109 S.Ct. 454 (1988) (basketball coach suspended; established practice of renewing one-year contracts gives rise to property interest; in addition, as limiting plaintiff's position to teaching physical education "would be a drastic change," this interest encompassed his coaching position).

There is a division of authority on the question of whether participation in interscholastic sports and other extracurricular activities involves a protected property interest. Compare Davis v. Central Dauphin School District School Board, 466 F. Supp. 1259 (M.D. Pa. 1979) (athletic policy gave rise to protected interest in participation on high school team); and Palmer v. Merluzzi, 868 F.2d 90, 95 (3rd Cir. 1989) (court assumes without deciding, 2 to 1, a protected interest in participation on high school football team; dissenting judge of view that New Jersey courts would find a protected interest) with Poling v. Murphy, 872 F.2d 757, 764 (6th Cir. 1989) (no protected interest in participation in student council election). The decisions are summarized, and doctrinal problems in the courts' treatment of the area discussed, in Chapter II. F., "Exclusion from Extracurricular Activities".

There is some authority that an applicant possesses no protected liberty or property interests until the school has accepted the applicant for admission. See Phelps v. Washburn University of Topeka, 632 F. Supp. 455 (D. Kan. 1986) (neither liberty nor property interest implicated in denial of admission to law school). Courts have arrived at differing results when the student has already been accepted or admitted and then is released or denied re-enrollment. Compare Picozzi v. Sandalow, *supra*, and Martin v. Helstad, 578 F. Supp. 1473 (W.D. Wis. 1983) (applicant accepted to law school had minimal property interest which required some due process procedures prior to rescission of admission) with Anderson v. University of Wisconsin, 665 F. Supp. 1372, 1396-97 (W.D. Wis. 1987) (plaintiff failed to show property interest in being readmitted to law school after expulsion, *i.e.*, no state statute, university rule, or other basis for finding property interest).

2. Liberty Interests

The Due Process Clause also forbids arbitrary deprivations of liberty. "Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him," the minimal requirements of the Clause must be satisfied. Wisconsin v. Constantineau, 400 U.S. 433, 437, 91 S.Ct. 507, 510 (1971); Board of Regents v. Roth, 408 U.S. [564] at 570-71, 92 S.Ct. [2701] at 2707 [(1972)]. School authorities here suspended appellees from school for periods of up to 10 days based on charges of misconduct. If sustained and recorded, those charges could seriously damage the students' standing with their fellow pupils and their teachers as well as interfere with later opportunities for higher education and employment. It is apparent that the claimed right of the State to determine unilaterally and without process whether that misconduct has occurred immediately collides with the requirements of the Constitution.

Goss v. Lopez, 419 U.S. 565, 574-75, 95 S.Ct. 729, 736 (1975) (footnote omitted).

See:

- Lightsey v. King, 567 F. Supp. 645, 648-49 (E.D.N.Y. 1983) (merchant marine academy student's being accused of cheating implicated the student's liberty interest by impairing the student's good name, honor, reputation, and integrity; student also received a failing grade for the alleged misconduct).

In addition to the liberty interest in reputation, the Supreme Court has recognized other liberty interests protected by the fourteenth amendment due process clause that may be threatened by government action when it:

- (1) abridges an individual's other constitutional rights, Perry v. Sindermann, 408 U.S. 593, 597, 92 S.Ct. 2694, 2697 (1972) (freedom of speech); N.A.A.C.P. v. Alabama, 357 U.S. 449, 461-63, 78 S.Ct. 1163, 1171-72 (1958) (freedom of association); Roe v. Wade, 410 U.S. 113, 152, 93 S.Ct. 705, 726 (1973) (privacy) [see (4) below];
- (2) imposes upon an individual "a stigma or other disability that foreclose(s) his freedom to take advantage of other employment opportunities," Board of Regents v. Roth, 408 U.S. 564, 573-74, 92 S.Ct. 2701, 2707 (1972);
- (3) deprives a person of the right "to contract, to engage in any of the common occupations of life, to acquire useful knowledge," Roth, *supra*, 408 U.S. at 572, 92 S.Ct. at 2707; Meyer v. Nebraska, 262 U.S. 390, 399, 43 S.Ct. 625, 626 (1923); *see also* Cox v. Northern Virginia Transportation Commission, 551 F.2d 555, 558 (4th Cir.

1977); Grove v. Ohio State University, 424 F. Supp. 377, 382 (S.D. Ohio 1976);

- (4) deprives a person of the liberty interest in the "right of personal privacy," Roe v. Wade, 410 U.S. 113, 152, 93 S.Ct. 705, 726 (1973), which "includes 'the interest in independence in making certain kinds of important decisions,'" Whalen v. Roe, 429 U.S. 589, 599-600, 97 S.Ct. 869, 876 (1977), such as "personal decisions 'relating to marriage, Loving v. Virginia, 388 U.S. 1, 12, 87 S.Ct. 1817, 1823 (1967); procreation, Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 541-42, 62 S.Ct. 1110, 1113-14 (1942); contraception, Eisenstadt v. Baird, 405 U.S. [438] at 453-54, 92 S.Ct. [1029] at 1038-39 [(1972)]; *id.* at 460, 463-65, 92 S.Ct. at 1042, 1043-44 (White, J., concurring in result); family relationships, Prince v. Massachusetts, 321 U.S. 158, 166, 64 S.Ct. 438, 442 (1944); and child rearing and education, Pierce v. Society of Sisters, 268 U.S. 510, 535, 45 S.Ct. 571, 573 (1925); Meyer v. Nebraska, [262 U.S. 390, 399, 43 S.Ct. 625 (1923)]." Carey v. Population Services International, 431 U.S. 678, 684-85, 97 S.Ct. 2010, 2016 (1977), quoting Roe v. Wade, *supra*, 410 U.S. at 152-53, 93 S.Ct. at 726; *see also* Stough v. Crenshaw County Board of Education, 744 F.2d 1479, 1480 (11th Cir. 1984) (patronage policy which prohibited children of school employees from attending private school interfered excessively with parents' right to control education of their children);
- (5) intrudes "on personal security" or imposes "bodily restraint and punishment," Ingraham v. Wright, 430 U.S. 651, 672-74, 97 S.Ct. 1401, 1413-14 (1977). *See also* Jefferson v. Ysleta Independent School District, 817 F.2d 303, 305 (5th Cir. 1987) (child tied to chair for nearly two full school days as "educational" exercise; violation of bodily integrity); Hall v. Tawney, 621 F.2d 607, 613 (4th Cir. 1980) (extreme corporal punishment: "bodily security").

For more on protected liberty interests, *see*:

- Vitek v. Jones, 445 U.S. 480, 487-490, 100 S.Ct. 1254, 1261-62 (1980) (involuntary transfer of prisoner to mental hospital implicates protected liberty interest);
- Stanley v. Illinois, 405 U.S. 645, 651-52, 92 S.Ct. 1208, 1212-13 (1972) (unwed father has interest in raising children, requiring a hearing prior to removing children from home on presumption of unfitness);
- Bolling v. Sharpe, 347 U.S. 497, 499-500, 74 S.Ct. 693, 694 (1954) (racial segregation of school children violates liberty interest under due process clause of fifth amendment).

There must be evidentiary support for the premise that a liberty interest will be infringed; "assumption" will not suffice. Board of Regents v. Roth, *supra*, 408 U.S. at 574 n.13, 97 S.Ct. 2707 n.13.

See:

- Schaill v. Tippecanoe County School Corp., 864 F.2d 1309, 1323 (7th Cir. 1988) (drug testing program for high school athletes; "...[I]t is highly speculative to assume that the reasons for a student's suspension from athletic competition will become general knowledge, and that the student's reputation will be adversely affected by a suspension.");
- Harris v. Blake, 798 F.2d 419, 422-23 (10th Cir. 1986) (withdrawal from graduate program based on academic evaluation; "Nor is there evidence that Harris suffered the requisite injury to his reputation or that he was denied enrollment elsewhere as a result.");
- Swany v. San Ramon Valley Unified School District, 720 F.Supp. 764, 775-76 (N.D. Cal. 1989) (delay in providing student diploma and his preclusion from the commencement exercise did not, in fact, deprive him of "his good name, reputation, or honor or any future opportunities");
- Tarkanian v. National Collegiate Athletic Association, 741 P.2d 1345, 1349-50 (Nev. 1987), *rev'd on other grounds*, 109 S.Ct. 454 (1988) (liberty interest found under "stigma-plus" test where dismissal of basketball coach would foreclose future employment opportunities and reassignment as professor without coaching assignment would drastically alter his position);
- New Braunfels Independent School District v. Armke, 658 S.W. 2d 330, 332 (Tex. App. 1983) (academic sanctions for consuming alcoholic beverage on school trip; "Furthermore, the evidence does not show that imposition of the scholastic penalties proposed will have any negative impact on the honor, reputation or name of either Appellee. The record shows that Appellees, at the time of hearing below, had already been admitted to the university of their choice and does not show that imposition of the scholastic penalties in this instance will adversely affect them in their educational, professional or personal lives in the future.").

3. More Recent Developments Regarding Liberty Interests

Subsequent to the 1975 decision in Goss v. Lopez, the Supreme Court narrowed the avenues for asserting harm to the liberty interest in good name, reputation, honor, or integrity.

First, the Court stated that damage to "reputation alone" does not require due process in the absence of some governmental action against the person whose reputation is being damaged. Paul v. Davis, 424 U.S. 693, 706-10, 96 S.Ct. 1155, 1163-65 (1976); *see also* Edwards v. Rees, 883 F.2d 882, 885-86 (10th Cir. 1989). However, later decisions have found a due process liberty interest at stake where the government has damaged a person's reputation in the process of taking significant action against that person, such as refusal to rehire, dismissal from a job, or discharge from the military, even when there is no property interest in the job or military status.

See:

- Owen v. City of Independence, 445 U.S. 622, 633 n.13, 100 S.Ct. 1398, 1406-07 n.13 (1980), *aff'd* 560 F.2d 925, 934-37 (8th Cir. 1977) (police chief discharged);
- Huntley v. Community School Board, 543 F.2d 979, 984-86 (2d Cir. 1976) (circumstances of acting school principal's termination raised question of competence and impaired ability to obtain future government employment);
- Cox v. Northern Virginia Transportation Commission, 551 F.2d 555, 558 (4th Cir. 1977) (state employee's discharge publicly attributed to involvement in financial scandal);
- Marrero v. City of Hialeah, 625 F.2d 499, 512-13 and n.17 (5th Cir. 1980) (plaintiffs' reputations injured by defamatory statements based on illegal search and seizure);
- Dennis v. S & S Consolidated Rural High School District, 577 F.2d 338 (5th Cir. 1978) (teacher's contract not renewed on basis of alleged "drinking problem");
- Larry v. Lawler, 605 F.2d 954, 957-59 (7th Cir. 1978) (plaintiff ruled ineligible for federal employment on ground of alleged alcoholism and abusive behavior);
- Colatizzi v. Walker, 542 F.2d 969, 973-74 (7th Cir. 1976) (state officials discharged and publicly accused of abusing their positions);
- Stevens v. Joint School District No. 1, 429 F. Supp. 477, 485-86 (W.D. Wis. 1977) (teacher's contract not renewed).

Second, the reputational interest comes into play only if the damaging information is disclosed to others [Bishop v. Wood, 426 U.S. 341, 348, 96 S.Ct. 2074, 2079 (1976)] or disclosure is "likely." Kelleher v. Flawn, 761 F.2d 1079, 1088 (5th Cir. 1985). See also Clements v. Nassau County, 835 F.2d 1000, 1006 (2d Cir. 1987); Harris v. Blake, 798 F.2d 419, 422-23 n.2 (10th Cir. 1986) (only internal dissemination).

Third, where the *only* protected interest at stake is the interest in reputation because of what the government is doing to the individual, it may also be necessary to allege that the charges are false in order to obtain a hearing. Codd v. Vegler, 429 U.S. 624, 627-28, 97 S.Ct. 882, 884 (1977) (plaintiff did not contest the accuracy of allegedly damaging information). See also Palmer v. Merluzzi, 868 F.2d 90, 96 n.5 (3d Cir. 1989) ("Moreover, Palmer has not alleged or tendered any evidence indicating that he was not guilty as charged. Under these circumstances any injury to his reputation is attributable to his conduct and not to a deficiency of process."). Where a hearing is required, its purpose is to "accord an opportunity to refute the charge" Board of Regents v. Roth, 408 U.S. 564, 573, 92 S.Ct. 2701, 2707 (1972), and "... to provide the person an opportunity to clear his [or her] name," *id.* at n.12, 92 S.Ct. at 2707 n.12. See Codd v. Vegler, *supra*, 429 U.S. at 627, 97 S.Ct. at 883; Harris v. Blake, *supra*, 798 F.2d at 422-23 n.2.

4. Right to Due Process Depends Upon Existence of Liberty or Property Interest, Not on the Severity of the Loss (Unless *De Minimis*)

Appellants proceed to argue that even if there is a right to a public education protected by the Due Process Clause generally, the Clause comes into play only when the State subjects a student to a "severe detriment or grievous loss." The loss of 10 days, it is said, is neither severe nor grievous and the Due Process Clause is therefore of no relevance. Appellants' argument is again refuted by our prior decisions; for in determining "whether due process requirements apply in the first place, we must look not to the 'weight' but to the *nature* of the interest at stake." Board of Regents v. Roth, [408 U.S. 564] at 570-71, 92 S.Ct. [2701] at 2705-06 [(1972)]. Appellees were excluded from school only temporarily, it is true, but the length and consequent severity of a deprivation, while another factor to weigh in determining the appropriate form of hearing, "is not decisive of the basic right" to a hearing of some kind. Fuentes v. Shevin, 407 U.S. 67, 86, 92 S.Ct. 1983, 1997 (1972). The Court's view has been that as long as a property deprivation is not *de minimis*, its gravity is irrelevant to the question whether account must be taken of the Due Process Clause. Sniadach v. Family Finance Corp., 395 U.S. 337, 342, 89 S.Ct. 1820, 1823 (1969) (Harlan, J., concurring); Boddie v. Connecticut, 401 U.S. 371, 378-79, 91 S.Ct. 780, 786 (1971); Board of Regents v. Roth, 408 U.S. [564] at 570 n.8, 92 S.Ct. [2701] at 2705 [(1972)]. A 10-day suspension from school is not *de minimis* in our view and may not be imposed in complete disregard of the Due Process Clause.

A short suspension is, of course, a far milder deprivation than expulsion. But, "education is perhaps the most important function of state and local governments," Brown v. Board of Education, 347 U.S. 483, 493, 74 S.Ct. 686, 691 (1954), and the total exclusion from the educational process for more than a trivial period, and certainly if the suspension is for 10 days, is a serious event in the life of the suspended child. Neither the property interest in educational benefits temporarily denied nor the liberty interest in reputation, which is also implicated, is so insubstantial that suspensions may constitutionally be imposed by any procedure the school chooses, no matter how arbitrary.

Goss v. Lopez, 419 U.S. 565, 575-76, 95 S.Ct. 729, 736-37 (1975).

See:

- Rose v. Nashua Board of Education, 679 F.2d 279, 281-82 (1st Cir. 1982) (where temporary suspension of school bus transportation caused "inconvenience, not loss of educational opportunity," it was "a '*de minimis*' deprivation");
- Picozzi v. Sandalow, 623 F. Supp. 1571, 1577 (E.D. Mich. 1986), *aff'd without opinion*, 853 F.2d 924 (5th Cir. 1988) (plac[ing] a temporary and preliminary hurdle in Picozzi's [access to legal education], *pending the outcome of an administrative hearing*," is "enough to trigger due process protection") (emphasis in original);
- Wise v. Pea Ridge School District, 855 F.2d 560, 563 n.3 (8th Cir. 1988) (in-school suspension characterized in part by student's being given and completing all regular assignments; "*de minimis*" interference with student's interests);
- Fenton v. Stear, 423 F. Supp. 767, 772 (W.D. Pa. 1976) ("11-day in-school-restriction" a *de minimis* punishment where student was "supervised by a teacher and required to do his assigned school work");
- Dickens v. Johnson County Board of Education, 661 F. Supp. 155, 157-58 (E.D. Tenn. 1987) ("temporary isolation in 'time-out [room]'" was a *de minimis* interference with his property and liberty interests").

Note: The Wise, Fenton, and Dickens decisions on in-school suspensions should be viewed as consistent with Cole v. Newton Special Municipal Separate School District, *supra*, 676 F. Supp. at 751-52, discussed at Section I.B.1., *supra*, where the court ruled that the property interest recognized in Goss would be implicated by an in-school suspension where, in fact, "the student was deprived of instruction or the opportunity to learn." In any event, advocates should seek in part to develop facts on the adverse impact of losing classroom discussion.

5. Application to School Decisions Other Than Suspension

The protected interests which trigger due process when a student is suspended arguably are also at stake in a large number of other school decisions. This point was made by Justice Powell in his dissent in Goss:

Teachers and other school authorities are required to make many decisions that may have serious consequences for the pupil. They must decide, for example, how to grade the student's work, whether a student passes or fails a course, whether he is to be promoted, whether he is required to take certain subjects, whether he may be excluded from interscholastic athletics or other extracurricular activities, whether he may be removed from one school and sent to another, whether he may be bused long distances when available

schools are nearby, and whether he should be placed in a "general," "vocational," or "college-preparatory" track.

In these and many similar situations claims of impairment of one's educational entitlement identical in principle to those before the Court today can be asserted with equal or greater justification. Likewise, in many of these situations, the pupil can advance the same types of speculative and subjective injury given critical weight in this case.

419 U.S. 565, 597, 95 S.Ct. 729, 747-48 (1975) (Powell, J., dissenting) (footnotes omitted).

Before assuming that each student-related action requires the procedures applicable to suspension or expulsion to satisfy due process, the reader should check carefully the relevant section in Chapter II, "Application to Specific Forms of Discipline."

6. Parents' Right to Due Process

After setting out the right to notice and hearing and declaring that these rights must be afforded before the suspension decision except in emergencies, the three judge lower court in Goss held that the required notice and hearing were to be provided to the parent as well as the student. Lopez v. Williams, 372 F. Supp. 1279, 1299-1300, 1302 (S.D. Ohio 1979). While parental involvement was not discussed in the Supreme Court's opinion, the Court explicitly cited the holdings of the district court, including this requirement, and then stated, "We affirm." Goss, 419 U.S. at 572, 95 S.Ct. at 735.

Some other lower courts have stated that, for short suspensions, prior notice with opportunity for hearing should go to the parent as well as the student.

See:

- Mills v. Board of Education, 348 F. Supp. 866, 882-83 (D.D.C. 1972);
- Graham v. Knutzen, 362 F. Supp. 881, 885 (D. Neb. 1973);
- Vail v. Board of Education, 354 F. Supp. 592, 603 (D.N.H. 1973), remanded for add'l relief, 502 F.2d 1159 (1st Cir. 1973);
- Givens v. Poe, 346 F. Supp. 202, 209, 211 (W.D.N.C. 1972).

Cf.:

- Brown v. Board of Education of Tipton County, C.A. No. 79-2234-M (W.D. Tenn. May 3, 1979) (Clearinghouse No. 26,964H) (notice of short suspension to parents must describe the charges and the procedure for obtaining a review of the decision);

- W.A.N. v. School Board of Polk County, 504 So.2d 529 (Fla. Dist. Ct. App. 1987) (since transfer of student to separate facility was equivalent to suspension, principal and school board were required by Florida statute to notify parent prior to effective time of suspension; involvement of parents is desirable to correct errant behavior and avoid stigma of suspension);
- Kraut v. Rachford, 51 Ill. App. 3d 206, 366 N.E.2d 497, 503 (Ill. Ct. App. 1977) (student dropped from enrollment on grounds of non-residency; speaking of due process generally, court stated, "where the interests of a minor student are involved, his parents should be notified of the pending action");
- Commonwealth v. A Juvenile, No. 8909 JV 55, District Court Dept., Brookline (Mass.) Division (Clearinghouse No. 45,538) (where principal interrogated juvenile about vandalism, after investigation had focused on juvenile, incriminatory statements must be suppressed for failure to provide Miranda warning; and under Massachusetts law, had warning been given, youth would have to have had "opportunity for a meaningful consultation with a parent, interested adult, or attorney..."; footnote omitted);
- Ross v. DiSare, 500 F.Supp. 928, 934 (S.D.N.Y. 1977) (pendent claim; N.Y. statute requires notice to parent before suspension in excess of five days).

Further, some form of due process for parents should be required, in light of the Supreme Court's longstanding recognition that parents have a liberty interest in their children's education protected by the due process clause. See Pierce v. Society of Sisters, 268 U.S. 510, 534-35, 45 S.Ct. 571, 573 (1925); Meyer v. Nebraska, 262 U.S. 390, 399-400, 43 S.Ct. 625, 627 (1923); see also Sullivan v. Houston Independent School District, 307 F. Supp. 1328, 1343 (S.D. Tex. 1969).

Also, most states have statutes making the parent responsible for the child's attendance under compulsory attendance laws. See Sullivan, *supra*. By the same reasoning, notice to parents and their right to a hearing would not be required for students who are not minors. Morale v. Grigel, 422 F. Supp. 988, 1003 (D.N.H. 1976).

But see:

- Arnold v. Board of Education of Escambia County, Alabama, 880 F.2d 305, 318 (11th Cir. 1989) (parent "has no standing to assert a claim based upon her son's suspension");
- Boster v. Philpot, 645 F. Supp. 798, 806-08 (D. Kan. 1986) (parents did not have due process right to challenge the discipline imposed); parents were provided post-suspension notice of the discipline as required by Kansas law)
- Boynton v. Casey, 543 F. Supp. 995, 998 (D. Me. 1982) (no requirement of notice to student and parents of right to have parents present during questioning);
- Pollnow v. Glennon, 594 F. Supp. 220, 224 (S.D.N.Y. 1984) (no requirement to advise student that he could call parents before discussing incident).

Note: The possibility of parents' interests under Pierce-Meyer was discussed only in Boster, and incompletely there.

C. HOW MUCH DUE PROCESS: Balancing Test

"Once it is determined that due process applies, the question remains what process is due."

Morrissey v. Brewer, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600 (1972).

1. Overview and Supreme Court Decisions

The extent of the procedures required by due process varies according to the nature of the case. To resolve the question of "what process is due," the Supreme Court has adopted a three-factor balancing test. See Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893 (1976) (discussed below). The factors considered in this balancing test are the seriousness of the liberty or property deprivations (i.e., the private interest at stake), the kind of procedures that are most appropriate to deciding the issues at hand (i.e., the risk of erroneous deprivation and the value of additional procedures in reducing that risk), and the administrative burden (i.e., the government's interest). The basic aim of procedural due process is to minimize the risk of arbitrary and erroneous deprivations of property and liberty interests. The Supreme Court has reiterated that regardless of the outcome of this balancing test, due process requires, at a minimum, some kind of notice and the opportunity to be heard. The Court has created an exception to this requirement for corporal punishment and strongly implied one for academic evaluation. In other relevant contexts, however, the Court has continued to state the requirement as a general rule.

[T]he interpretation and application of the Due Process Clause are intensely practical matters and ... "[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." Cafeteria Workers v. McElroy, 367 U.S. 886, 895, 81 S.Ct. 1743, 1748 (1961).

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There are certain bench marks to guide us, however. Mullane v. Central Hanover Trust Co., 339 U.S. 306 at 314, 70 S.Ct. at 657... said that "[m]any controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." "The fundamental requisite of due process of law is the opportunity to be heard," Grannis v. Ordean, 234 U.S. 385, 394, 34 S.Ct. 779, 783 (1914), a right that "has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to ... contest." Mullane v. Central Hanover Trust Co., 339 U.S. at 314, 70 S.Ct. at 657. See also Armstrong v. Manzo, 380 U.S. 545, 550, 85 S.Ct. 1187, 1190 (1965); Joint Anti-Fascist Committee v. McGrath, 341 U.S. 123, 168-69, 71 S.Ct. 624, 646-47 (1951) (Frankfurter, J., concurring). At the very minimum, therefore, students facing suspension and the consequent interference with a protected

property interest must be given some kind of notice and afforded some kind of hearing. "Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified." Baldwin v. Hale, 1 Wall. 223, 233 (1864).

It also appears from our cases that the timing and content of the notice and the nature of the hearing will depend on appropriate accommodation of the competing interests involved. Cafeteria Workers v. McElroy, 367 U.S. at 895, 81 S.Ct. at 1748; Morrissey v. Brewer, 408 U.S. [471] at 481, 92 S.Ct. [2593] at 2600 [(1972)]. The student's interest is to avoid unfair or mistaken exclusion from the educational process, with all of its unfortunate consequences. The Due Process Clause will not shield him from suspensions properly imposed, but it deserves both his interest and the interest of the State if his suspension is in fact unwarranted.... The risk of error is not at all trivial, and it should be guarded against if that may be done without prohibitive cost or interference with the educational process."

Goss v. Lopez, 419 U.S. 565, 578-80, 95 S.Ct. 729, 738-39 (1975) (emphasis in original).

This Court consistently has held that some form of hearing is required before an individual is finally deprived of a property interest. Wolff v. McDonnell, 418 U.S. 539, 557-58, 94 S.Ct. 2963, 2975-76 (1974). See, e.g., Phillips v. Commissioner of Internal Revenue, 283 U.S. 589, 596-97, 51 S.Ct. 608, 611-12 (1931). See also Dent v. West Virginia, 129 U.S. 114, 124-25, 9 S.Ct. 231, 234 (1889). The "right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society." Joint Anti-Fascist Committee v. McGrath, 341 U.S. 123, 168, 71 S.Ct. 624, 646 (1951) (Frankfurter, J., concurring). The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." Armstrong v. Manzo, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191 (1965). See Grannis v. Ordean, 234 U.S. 385, 394, 34 S.Ct. 779, 783 (1914).

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[O]ur prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the

fiscal and administrative burdens that the additional or substitute procedural requirement would entail. See, e.g., Goldberg v. Kelly, 397 U.S. [254] at 263-71, 90 S.Ct. [1011] at 1018-22 [(1970)].

Mathews v. Eldridge, 424 U.S. 319, 333, 334-35, 96 S.Ct. 893, 902, 903 (1976).

2. Some Form of Notice and Hearing

Notice and hearing must occur before a suspension or other exclusion, except in emergency situations. Goss v. Lopez, 419 U.S. 565, 582, 95 S.Ct. 729, 740 (1975). The Supreme Court has carved out two exceptions to the general rule requiring prior notice and hearing. The first relates to corporal punishment. In Ingraham v. Wright, 430 U.S. 651, 674-681, 97 S.Ct. 1401, 1414-1417 (1977), the Court recognized that students subjected to corporal punishment are entitled to due process, but held that the necessary due process need not include a hearing. The Court reasoned that adequate due process protection is provided (in view of the alleged "low incidence of abuse" and "openness of our schools") by the right of students to sue in state court subsequent to the punishment, e.g., for assault and battery.

The empirical assumptions and legal reasoning of this decision have been subjected to severe criticism elsewhere. See, for example, Thomas J. Flygare, "Ingraham v. Wright: The Return of Old Jack Seaver," 23 *Inequality in Education* 29 (September 1978).

The second exception was articulated in Board of Curators v. Horowitz, 435 U.S. 78, 98 S.Ct. 948 (1978). The Court found that dismissals from a university for academic reasons stood on different ground than dismissals for disciplinary reasons. The Court held that the former do not require hearings because, assuming due process is required, other procedures are sufficient and are more appropriate for academic matters.

The applicability of these decisions beyond corporal punishment and academic decisions is quite limited. In other contexts, the Supreme Court has adhered to the holdings of Goss v. Lopez, Mathews v. Eldridge, and Wolff v. McDonnell, *supra*. The Court continues to hold that, at a minimum, due process requires that people being deprived of property or liberty interests must be given some form of notice and the opportunity for some type of hearing, and that this notice and hearing occur *before* the deprivation unless a genuine emergency exists.

See, e.g.:

- Cleveland Board of Education v. Loudermill, 470 U.S. 532, 542-46, 105 S.Ct. 1487, 1493-95 (1985) (notice of charges, explanation of evidence and opportunity for school board employee to tell his side are necessary prior to termination);

- Memphis Light, Gas & Water Division v. Craft, 436 U.S. 1, 13, 16, 98 S.Ct. 1554, 1562, 1564 (1978) (termination of utility services);
- Smith v. Organization of Foster Families, 431 U.S. 816, 848, 97 S.Ct. 2094, 2111-12 (1977) (removal of foster children from foster families).

See also:

- Jackson v. Franklin County School Board, 806 F.2d 623, 631 (5th Cir. 1986) ("...due process rights...were violated by...officials' failure to provide notice and a hearing concerning [plaintiffs] continued exclusion from school" ["for two months in the fall..."]);
- Rankin v. Independent School District No. 1-3, 876 F.2d 838, 839-42 (10th Cir. 1989) (statute requiring tenured teacher subject to dismissal proceedings to pay fifty percent of the cost of the hearing is inconsistent with due process guarantees);
- Montoya v. Sanger Unified School District, 502 F. Supp. 209, 213 (E.D. Cal. 1980) (extension of suspension from five days to date of expulsion hearing; "...any extension of a suspension under §48903(h) is, under Goss, a separate, distinct suspension requiring a separate hearing");
- Lightsey v. King, 567 F. Supp. 645, 649 (E.D.N.Y. 1983) (after honor board exonerated midshipman of cheating, Academy ignored outcome; "There is no difference between failing to provide a due process hearing and providing one but ignoring the outcome.").

The Goss opinion clearly states that hearings are required for disciplinary exclusions and that such hearings must precede the exclusion. 419 U.S. at 581-82, 95 S.Ct. at 739-40. The sole exception is the infrequent occurrence where emergency conditions require that the hearing be postponed and the student be removed immediately to preserve order or protect physical safety. *Id.* at 582-83, 95 S.Ct. at 740. See Chapter II. A. on prior hearings and emergency suspensions.

3. The Right to A Hearing Where Misconduct Is Not In Dispute

A student has the right to an adequate hearing on the appropriateness of the penalty even when there is no dispute as to the existence of misconduct. In Strickland v. Inlow, 519 F.2d 744, 746 (8th Cir. 1975), the court stated:

Yet, even in the context of minor disciplinary action, the student has the right to be afforded an opportunity to present his side of the case. This opportunity to be heard is no less important when, as here, there is not a serious dispute over the factual basis of the charge, for

...things are not always as they seem to be, and the student will at least have the opportunity to characterize his conduct and put it in what he deems the proper context.

[quoting Goss v. Lopez, 419 U.S. 565, 584, 95 S.Ct. 729, 741 (1975) (citation omitted)].

See:

- Lee v. Macon County Board of Education, 490 F.2d 458, 460 (5th Cir. 1974) (expulsion; despite existence of misconduct, "[f]ormalistic acceptance or ratification of the principal's request or recommendation as to the scope of punishment, without independent Board consideration of what, under all the circumstances, the penalty should be, is less than full due process");
- Lamb v. Panhandle Community Unit School District No. 2, 826 F.2d 526, 528-29 (7th Cir. 1987) (suspension; student had opportunity to make mitigative argument);
- Betts v. Board of Education, 466 F.2d 629, 633 (7th Cir. 1972) (disciplinary transfer; "opportunity to be heard on the question of what discipline is warranted by the identified offense" and "to present a mitigative argument");
- Taylor v. Grisham, Civil No. A-75-CA-13 (W.D. Tex., Feb. 24, 1975) (Clearinghouse No. 15,925) (following Lee, *supra*, court held that an "automatic" permanent suspension rule for drug use was invalid);
- Braesch v. DePasquale, 206 Neb. 726, 734-35, 265 N.W.2d 842, 846 (Neb. 1978), *cert. denied*, 439 U.S. 1068 (1979) (exclusion from basketball team for remainder of season; where students admitted guilt, procedures which included hearing on appropriate penalty were found adequate);
- Kwiatkowski v. Ithaca College, 82 Misc. 2d 43, 368 N.Y.S.2d 973 (N.Y. Sup. Ct. 1975) (one-term suspension reversed because of failure to allow student to be heard on the excessiveness of the penalty).

Compare:

- Brewer v. Austin Independent School District, 779 F.2d 260, 263 (5th Cir. 1985) (eight-week suspension; as Brewer admitted possession of drugs and paraphernalia, any due process violation could only relate to the penalty determination; no requirement "to provide a fact hearing as to the accuracy of each bit of evidence considered in determining the appropriate length of the punishment...").

See also:

- Tedeschi v. Wagner College, 49 N.Y.2d 652, 662 n.*, 404 N.E.2d 1302, --- n.*, 427 N.Y.S.2d 760, 765 n.* (N.Y. 1980) (expulsion; claim against private college based upon law of associations and contract law; "...the student should have some opportunity to justify his behavior...").

Cf.:

- Morrissey v. Brewer, 408 U.S. 471, 480, 488, 92 S.Ct. 2593, 2600, 2603-04 (1972) (once it has been determined that parolee violated conditions of parole, determination of whether this warrants revocation of parole must still be made).

4. **Arguing for More Extensive Procedures: The Mathews v. Eldridge Factors**

In deciding upon what kind of notice and hearing is required (or what other procedures are required in those limited situations where notice and hearing are not mandatory), the three factors listed in Mathews v. Eldridge, 424 U.S. 319, 335, 96 S.Ct. 893, 903 (1976) (quoted above), are the starting point. However, court applications of this standard have not been favorable to students. See I.C.5., *infra*. Advocates should consider two approaches. First, the viability of state claims in the particular jurisdiction should be canvassed carefully. Second, in some areas, decisions establish favorable precedent regarding required procedures without explicit reference to Mathews. See in particular Chapter II.B. *re* Long-term Suspension and Expulsion. Such decisions are a better starting point. When confronting the Mathews standard, an advocate must make as concrete a showing as possible that the procedure sought would minimize the risk of error.

(a.) **The Private Interests at Stake; Unusual Situations" Under Goss**

The first factor in the analysis is the private interest that will be affected by the disciplinary action. Mathews, 424 U.S. at 335, 96 S.Ct. at 903. Many decisions support the proposition that longer exclusions, being more serious deprivations of liberty and property interests, entitle the student to additional procedural safeguards beyond those mentioned in Goss. See cases cited in Chapter II.B., "Long-Term Suspension and Expulsion," and the citations throughout Chapter III., "Specific Elements of Due Process."

In addition to the length of the exclusion, there are other factors which may affect the private interest at stake. See Goss, 419 U.S. at 584, 95 S.Ct. at 741 ("Nor do we put aside the possibility that in unusual situations, although involving only a short suspension, something more than the rudimentary procedures will be required"). For instance, more serious charges that will appear on the student's record represent a greater deprivation of liberty interests even when the length of the exclusion is the same (e.g., the difference between a three-day suspension for smoking and a three-day suspension for stealing or for assault).

See:

- Jaksa v. Regents of University of Michigan, 597 F. Supp. 1245, 1248 n.2 (E.D. Mich. 1984) ("Further, dismissal for cheating requires greater procedural protection than academic dismissals since the former are more stigmatizing than the latter, and may have a greater impact on a student's future."); *aff'd without opinion*, 787 F.2d 590 (6th Cir. 1986);
- Smyth v. Lubbers, 398 F. Supp. 777, 796-97 (W.D. Mich. 1975) (charge of drug possession triggers more formal procedures);

Cf.:

- McGhee v. Draper, 564 F.2d 902, 912 (10th Cir. 1977) (in teacher discharge case, fact that "the matters in question touched on morality and professional capacity and plaintiff's livelihood" affects the procedures required).

But see:

- Paredes v. Curtis, 864 F.2d 426, 428-29 (6th Cir. 1988) (proposed ten day suspension for "drug charges" not an "unusual situation" warranting application of "Mathews balancing test" rather than "Goss standard").

Potential restrictions on the exercise of other constitutional rights can also increase the needed degree of procedural formality. In PUSH v. Carey, a federal district court was faced with the suspension of a student for his refusal to remove an earring which he claimed was a symbol of Black pride. The court stated: "[T]he first amendment implication of [this] case also warrants stricter procedural safeguards before a suspension can be imposed." C.A. Nos. 73-C-2522, 74-C-303, Slip Op. at 8-9 (N.D. Ill., Nov. 5, 1975) (Clearinghouse No. 17,507) (suspensions potentially beyond 10 days), *rev'd in part on other grounds sub nom. Piphus v. Carey*, 545 F.2d 30 (7th Cir. 1976) (reversed because of lower court's failure to award damages to students), *rev'd on other grounds*, 435 U.S. 247, 98 S.Ct. 1042 (1978) (reversed on damages issue).

Finally, a short exclusion or other punishment may in fact be a more serious deprivation if additional penalties result. Such additional consequences may occur because the student will miss a particularly important event, such as an exam which cannot be made up or an important extracurricular event, or because academic penalties, such as a zero for each day, are imposed on suspended students. In Shanley v. Northeast Independent School District, 462 F.2d 960, 967 n.4 (5th Cir. 1972), the court noted:

[T]he "magnitude" of a penalty should be gauged by its effect upon the student and not simply meted out by formula. For example, a suspension of even one hour could be quite critical to an individual student if that hour encompassed a final exam that provided for no "make-up."

See:

- Jones v. Latexo Independent School District, 499 F. Supp. 223, 239 n.15 (E.D. Tex. 1980) (loss of grade points for each day of suspension "triggers somewhat greater procedural safeguards under the fourteenth amendment ...").

But see:

- Palmer v. Merluzzi, 868 F.2d 90, 96 (3rd Cir. 1989) ("rudimentary procedures" set forth in Goss applicable where 10-day suspension from school accompanied by 60-day suspension from football program);
- Keough v. Tate County Board of Educ., 748 F.2d 1077, 1080-81 (5th Cir. 1984) (ten day suspension imposed during final examinations; court wrote that "Goss makes no distinction between ten day suspensions that occur during examination periods and those that do not...");
- Lamb v. Panhandle Community School Dist. No. 2, 826 F.2d 526 (7th Cir. 1987) (suspension for final three days of school year, causing student to miss final exams, was not equivalent to expulsion since student would have been able to graduate had his grades been higher; procedures afforded were adequate).

(b.) Kinds of Procedures Needed to Minimize Mistakes

The second factor in Mathews is "the risk of an erroneous deprivation of [the private] interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards." 424 U.S. at 335, 96 S.Ct. at 903. An important question in assessing this factor is the extent to which factual issues are in dispute. If, for instance, a principal tells a student that a teacher has accused that student of doing something and the student outright denies it, there is probably no basis for the principal to make a decision which is not arbitrary or based upon prejudgment. Where facts are in dispute, a duty arises under the due process clause to provide meaningful protection against the risk of error, by bringing in witnesses who saw the event, giving both sides a chance to question the other, etc.

See:

Peter Roos, "Goss and Wood: Due Process and Student Discipline," 20 *Inequality in Education*, 42, 44 (1975);

William R. Hazard, "Goss and Wood: More and Better Due Process Required," in Anson and Kuriloff, eds., *Student's Right to Due Process: Professional Discretion and Liability under Goss and Wood*, 71, 73-77, 89-93 (Education Resources Division, Capitol Publications, Inc., 2430 Pennsylvania Ave., N.W., Washington, D.C. 20037).

Cf:

- McNaughton v. Circleville Board of Education, 345 N.E.2d 649, 656 (Ohio Ct. Common Pleas 1974) (three-day school suspensions and forty-day suspensions from athletic activity; if students had denied the accusations, more formal proceedings might have been required).

In McGhee v. Draper, 564 F.2d 902, 912 (10th Cir. 1977) (discharged teacher), the court stated that one factor requiring certain elements of due process was "that the disputed facts turned largely on the word of individuals." Similarly, in "Goss and Wood: More and Better Due Process Required," *supra*, at 75, William Hazard notes:

It would appear wise for the disciplinarian ... to require direct evidence from the teacher or other school official to corroborate the oral or written account of the student's alleged misconduct. The common practice in most schools is to refer suspension decisions to the school principal, although he or she is rarely a witness to the student's misconduct. A principal's reliance on a cryptic note or hurried conversation with the teacher or other staff member would seem to be a risky basis for even a short suspension.

The Center for Law and Education's *The Constitutional Rights of Students* (1976) points out two other examples of situations in which the risk of a wrong decision may require additional procedures: "short suspensions involving racial altercations where an abbreviated procedure might be interpreted by one faction as unduly favoring the other," and "short suspensions initiated by a teacher against whom students have lodged an unresolved complaint relating to that teacher's fairness in dealing with students." *Id.* at 226.

(c.) The Government's Interests

The third Mathews v. Eldridge factor is "the Government's interest," including the "fiscal and administrative burdens" which additional procedures would impose. 424 U.S. at 335, 96 S.Ct. at 903. When addressing this factor, it is helpful to demonstrate that the particular procedures desired are not unworkable and will not be used so often as to be burdensome. One might argue alternatively that if the system were to operate more justly and rely instead on nonpunitive solutions, the desired procedures would not have to be used often.

An advocate can also demonstrate that certain procedures may in the long run reduce administrative headaches. For instance, requirements that notice and findings be written or that the hearing be recorded can minimize lengthy disputes about what happened or what was communicated; parent participation in informal hearings may in the long run be simpler than dealing with the anger of parents who are notified after a decision has been reached. The costs to the state of unwarranted exclusion can also be described in terms of its connection to the dropout rate, vandalism and violence, disrespect for and retaliation against an

arbitrary school order, and the like. Moreover, independent of administrative or fiscal concerns, the government has an interest in keeping students in school, as evidenced by each state's compulsory attendance laws. As the Supreme Court stated, "[I]t disserves both [the student's] interest *and the interest of the State* if his suspension is in fact unwarranted." Goss v. Lopez, 419 U.S. at 579, 95 S.Ct. at 739 (emphasis added).

In any event, the government's interest is only one of the three factors which must be balanced. Standing alone, the government's interest cannot justify procedures which fail to serve the basic purposes of procedural due process: "to avoid unfair or mistaken exclusions" and to "provide a meaningful hedge against erroneous action." *Id.* at 579, 583, 95 S.Ct. at 739, 741.

5. Applications of the Mathews v. Eldridge Standard

Many (but not all) of the recent decisions address procedural due process questions by employing the factors of Mathews v. Eldridge, although it is common for a decision to apply Mathews to some but not all procedural issues.

See:

- Palmer v. Merluzzi, 868 F.2d 90, 95-96 (3d Cir. 1989) (60-day suspension from high school football team; "[S]ince the governmental interest at stake here is the same as that in Goss, since the incremental efficacy of the process proposed over the process afforded in not materially different than the one in that case, and since we find the student's interest to be only slightly greater, we conclude that the process required by Goss was sufficient in the circumstances presented by this case.");
- Newsome v. Batavia Local School Dist., 842 F.2d 920 (6th Cir. 1988) (expulsion of high school student for alleged possession and attempted sale of marijuana; balancing of Mathews factors led court to conclude that student's due process rights were not violated by the failure to identify student accusers and permit cross-examination of them and administrators);
- Picozzi v. Sandalow, 623 F. Supp. 1571, 1578-79 (E.D. Mich. 1986) *aff'd without opinion*, 827 F.2d 770 (6th Cir. 1987), *cert. denied*, 108 S.Ct. 777 (1988); (law student's return to school conditional on successful completion of lie detector test concerning fire in dormitory room; "Neither the specific dictates of Goss nor the general principles of Mathews entitled Picozzi to a [pre-deprivation hearing] ...");
- Jaksa v. Regents of University of Michigan, 597 F. Supp. 1245, 1254 (E.D. Mich. 1984), *aff'd* 787 F.2d 590 (6th Cir. 1986) (one term suspension for cheating on exam; "The additional procedures to which the plaintiff claims he was entitled [legal counsel, verbatim transcript, confrontation of accusers] are either too cumbersome and intrusive into the educational process, or would not reduce significantly the risk of an erroneous deprivation of rights");

- Nash v. Auburn University, 812 F.2d 655, 667 (11th Cir. 1987) (one year suspension from school of veterinary medicine for academic dishonesty; denial of "notice of the evidence to be presented against them and cross-examination of accusing witnesses" did not deny due process rights where events at hearing show "the potential value of the two additional procedures is doubtful");
- Hart v. Ferris State College, 557 F. Supp. 1379, 1384-89 (W.D. Mich. 1983) (college student arrested for sale of illegal drugs; preliminary injunction against disciplinary hearing denied; court applied Mathews factors to issue of cross-examination of witnesses by counsel, but not to the right to remain silent, to postpone the hearing until after resolution of criminal charges, to confront accusers, or to have a public hearing);
- Sykes v. Sweeney, 638 F. Supp. 274, 279 (E.D. Mo. 1986) (expulsion for disruptive behavior and truancy; general application of Mathews standard);
- Bleicker v. Board of Trustees of Ohio State, 485 F. Supp. 1381, 1387-88 (S.D. Ohio 1980) (dismissal from school of veterinary medicine for cheating; "The Court believes...that the proposed procedures would have contributed little toward reducing the risk of error in plaintiff's case.").

Cf.:

- Takeall v. Ambach, 609 F. Supp. 81, 85-86 (S.D.N.Y. 1985) (balancing of Mathews factors weighs in favor of requiring written notice of the basis for denial of student's application to enroll in the school system and availability of administrative remedies since a permanent deprivation of the student's interest in receiving an education was threatened, the risk of an erroneous deprivation was significant, and the administrative burden of requiring written notice was minor);
- Board of Education of City of Plainfield v. Cooperman, 105 N.J. 587, 523 A.2d 655, 661-62 (1987) (challenge to policy guidelines for admission of children with AIDS, ARC or HTLV-III antibody; due process requires that parties have the right to call witnesses and to cross-examine adverse witnesses).

6. Lack of Prejudice; Waiver

In some cases, courts bypass consideration of the adequacy of procedures. This has occurred where a student "admitted the charges" [Keough v. Tate County Board of Education, 748 F.2d 1077, 1083 (5th Cir. 1984)], evidence "was so overwhelming that the school board would again impose the same penalty..." [McClain v. Lafayette County Board of Education, 687 F.2d 121, 122 (5th Cir. 1982)], and students "[b]y admitting their guilt" were deemed to have "waived their right to a hearing." Boston v. Philpot, 645 F. Supp. 798, 805 (D. Kan. 1986).

This approach may be problematical. First. A student has a right to be heard on the issue of sanction even if misconduct is undisputed. See Chapter I. B.

3., above. Second. Evidence may seem "overwhelming" because it was not tested by adequate procedures. Third. Waiver of a constitutional right is not lightly assumed. See, e.g., Fuentes v. Sheven, 407 U.S. 67, 92 S.Ct. 1983, 2001-02 (1972) (no waiver of hearing rights prior to repossession of chattels; "Indeed, in the civil no less than the criminal area, 'courts indulge every reasonable presumption against waiver.'"; "[A] waiver of constitutional rights in any context must, at the very least, be clear."); Johnson v. United States Department of Agriculture, 734 F.2d 774, 784 (11th Cir. 1984) (challenge to "non-judicial" method for foreclosing mortgages; "Our precedent requires specific proof of a knowing and voluntary waiver of the constitutional right to due process."); People v. Wahlen, 443 N.E. 2d 728, 730-31 (Ill. App. 1982) (appeal from suppression of evidence seized in college student's room; consent was coerced).

In Doe v. Rockingham County School Board, 658 F. Supp. 403, 407-08 (W.D. Va. 1987), school authorities were held to have violated due process rights by excluding a student for 29 days without a hearing. The court observed that "failure on the part of school authorities to afford a hearing is not excused by later proof that the student is guilty of the offense charged" (at 407). It concluded that "as in the [Goss] case, there is no evidence that the plaintiff voluntarily relinquished his right to a hearing" (at 408).

See:

- Cole v. Newton Special Municipal Separate School District, 676 F. Supp. 749, 752 (S.D. Miss. 1987), *aff'd without opinion*, 853 F.2d 924 (5th Cir. 1988) (suspension; student admitted that she failed to obey teacher's demand to remove her sunglasses and that she was punished for that act, so she received all the process she was due);
- Keough v. Tate County Board of Education, 748 F.2d 1077, 1080, 1083 (5th Cir. 1984) (expulsion; court noted that misconduct took place in presence of administrator; "Clearly there was substantial evidence to support the district court's finding that Keough admitted the charges and therefore his suspension did not result from a procedural due process deprivation. See Fed. R. Civ. P. 52....");
- McClain v. Lafayette County Board of Education, 687 F.2d 121, 122 (5th Cir. 1982) (one year suspension for carrying firearm to school; "...we are unable to find substantial prejudice..."; "...the substantive evidence against him was so overwhelming that the school board would again impose the same penalty and a second hearing would accomplish no amelioration.");
- Nash v. Auburn University, 812 F.2d 655, 661-62 (11th Cir. 1987) (lengthy suspensions for cheating; "...acquiescence to the timing of the notice and hearing");
- Boster v. Philpot, 645 F. Supp. 798, 805 (D. Kan. 1986) (three day suspensions and exclusions from attending basketball games for vandalism; "By admitting their guilt, the plaintiffs waived their right to a hearing");
- Davis v. Mann, 721 F. Supp. 796, 801-02 (S.D. Miss. 1988) (academic exclusion from dental school residency program; "the restriction on counsel's participation did not substantially prejudice plaintiff's case");

plaintiff had opportunity to confer with his counsel in advance of hearing about key testimony);

- Birdsey v. Grand Blanc Community Schools, 344 N.W.2d 342, 346 (Mich. Ct. App. 1983) (expulsion; "Due process does not require an opportunity to confront and cross-examine inasmuch as plaintiffs did not refute the underlying facts of the charge.");
- Jones v. Board of Trustees, 524 So. 2d 968, 972 (Miss. 1988) (expulsion for semester; no "substantial prejudice" from asserted defect of notice);
- Rutz v. Essex Junction Prudential Committee, 457 A.2d 1368, 1374 (Vt. 1983) (expulsion; alleged lack of notice of charges; where student was "well aware of charges" and admitted to them, and the district substantially complied with its regulations, there was "a clear absence of any prejudice").

CHAPTER II

APPLICATION TO SPECIFIC FORMS OF DISCIPLINE

A. SUSPENSION FOR TEN DAYS OR LESS

1. Overview

The Supreme Court has held that students facing suspension of ten days or less are entitled to notice and hearing. Goss v. Lopez, 419 U.S. 565, 95 S.Ct. 729 (1975). The notice and hearing must occur prior to the suspension, except in genuine emergencies. Such emergencies exist only where the student's continued presence poses an ongoing danger of physical harm to persons or property or of serious disruption to the academic process. Where an actual emergency exists, the hearing must be held as soon as possible after the suspension begins.

The Court held that the required procedures include, at a minimum, oral or written notice of the charges, an explanation of the evidence supporting those charges, and an opportunity for the student to present his or her side of the story. There are certain other procedural rights which arguably are basic to any suspension hearing. Further, the Court left open the possibility that in unusual circumstances more elaborate procedures may be required. But note that the Court has stated, "Two days' suspension from school does not rise to the level of a penal sanction calling for the full panoply of procedural due process protections applicable to a criminal prosecution." Bethel School District No. 403 v. Fraser, 478 U.S. 675, 686, 106 S.Ct. 3159, 3166 (1986) (rejecting due process claim that student did not have notice that "lewd speech" would subject him to sanctions).

The Court has articulated factors to determine what kind of procedures are warranted under the due process clause. These factors should be employed to address "unusual" suspensions. Using these factors, additional procedures may be appropriate when there are significant factual disputes or when the short suspension results in "unusual" harm to the student. See Chapter I. C. 4., 5.

2. Basic Right to Notice and Hearing

The Supreme Court described procedures for the "usual" short suspension as follows.

At the very minimum, therefore, students facing suspension and the consequent interference with a protected property interest must be given *some* kind of notice and afforded *some* kind of hearing.

• • • •

Students facing temporary suspension have interests qualifying for protection of the Due Process Clause, and due process requires, in connection with a suspension of 10 days or less, that the student be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story....

There need be no delay between the time "notice" is given and the time of the hearing. In the great majority of cases the disciplinarian may informally discuss the alleged misconduct with the student minutes after it has occurred. We hold only that, in being given an opportunity to explain his version of the facts at this discussion, the student first be told what he is accused of doing and what the basis of the accusation is....

Goss v. Lopez, 419 U.S. 565, 579, 581-82, 95 S.Ct. 729, 738, 740 (1975).

The Goss Court stated that in "usual" cases, the due process clause did not "require, countrywide, that hearings ... must afford the student the opportunity to secure counsel, to confront and cross-examine witnesses supporting the charge, or to call his own witnesses to verify his account of the incident." *Id.* at 582, 583, 95 S.Ct. at 740.

The Court also stated that the right to notice and hearing applies to any suspension "for more than a trivial period" or "of 10 days or less." *Id.* at 576, 581, 95 S.Ct. at 737, 740. According to Justice Powell, this right is invoked with any suspension "for as much as a single day." *Id.* at 585 and n.3, 95 S.Ct. at 741-42 and n.3 (Powell, J., dissenting).

See:

- Shanley v. Northeast Independent School District, 462 F.2d 960, 967 n.4 (5th Cir. 1972) (court discusses the serious nature of three-day suspensions);
- Arnold v. Board of Education of Escambia County, 880 F.2d 305, 318 (11th Cir. 1989) (complaint properly alleged three-day suspension inconsistent with Goss standard);

- Henderson v. Van Buren Public Schools Superintendent, C.A. No. 7-70865 (E.D. Mich. Dec 29, 1978) (Clearinghouse No. 20,722) (jury award of \$100 for a one-day suspension without a hearing upheld as proper);
- Hillman v. Elliot, 436 F. Supp. 812 (W.D. Va. 1977) (three-day suspension is more than *de minimis*).

For more on the basic right to a hearing, see Chapter I.

3. Prior Hearing -- Except for Emergencies

As a general rule, the notice and hearing must occur before the suspension is imposed. Goss v. Lopez, 419 U.S. at 582, 95 S.Ct. at 740. However, "students whose presence poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process may be immediately removed from school. In such cases, the necessary notice and rudimentary hearing should follow as soon as practicable...." *Id.* at 582-83, 92 S.Ct. at 740. The outside deadline in such emergencies is three days. Lopez v. Williams, 372 F. Supp. 1279 (S.D. Ohio 1972), *aff'd sub nom. Goss v. Lopez*, 419 U.S. 565, 95 S.Ct. 729 (1975).

The "emergency" suspension exception is subject to abuse. For more on this issue, see Chapter III.A., "Prior Hearings and the Emergency Exception."

4. Other Rights in Any Short Suspension Hearing: Impartial, Independent Determination of Specific Misconduct

There are certain other rights which arguably apply to any suspension. They were alluded to in Goss, but in a less obvious way than the rights of notice and prior hearing. Other decisions and basic due process principles indicate that these additional elements are essential for any fair hearing.

- Although the procedures in the simple suspension are relatively informal it cannot be emphasized too strongly that the entire thrust of the requirement is to insure that there is a genuine fact-finding process which is a 'meaningful hedge' against erroneous action. [Goss, 419 U.S. at 583, 95 S.Ct. at 741.] This being the case it would seem that three common practices of school officials are now implicitly prohibited.

First, the person making the decision must be relatively free from bias. Thus, minimally, if the person involved in the decision to suspend is involved in the alleged incident he or she cannot determine guilt. Although passive observance would likely not result in disqualification to decide the issue, the court did note that observation did not obviate the need to follow the procedures. [*Id.* at 584, 95 S.Ct. at 741.]

Second, no longer may a teacher or other adults' words be given an irrebuttable presumption of truthfulness. In Goss there was testimony, alluded to by Mr. Justice White, by a principal that in the common suspension a teacher would tell him one thing and a student another. When asked how he resolved this conflict he replied, "Then the teacher's word would be the deciding factor." Such a resolution is clearly contrary to the spirit of Goss and would now be prohibited. Indeed, if the issue boiled down to such a confrontation and could not be resolved without resort to this impermissible presumption, seemingly the suspension would move from a 'simple' to an unusual short-term suspension.

Third, there must now be a fact-finding determination which precedes a determination of what to do about the child. Commonly these concerns get mixed up and the determination of whether the student was guilty of the act charged gets lost in the process. A determination of guilt for a specified offense based upon evidence is, under Goss, a prerequisite for a suspension. This prerequisite must be met before school officials can properly determine if a suspension or some other alternative is in the 'best interest' of the child.

Peter Roos, "Goss and Wood: Due Process and Student Discipline," 20 *Inequality in Education* 42, 43-44 (July 1975).

The absence of an impartial review of the facts and a specific determination of misconduct would make the hearing a meaningless charade rather than protection "against unfair or mistaken findings of misconduct and arbitrary exclusion from school," identified by the Court as the purpose of the hearing. Goss, 419 U.S. at 581, 95 S.Ct. at 740; see also id. at 580-81 n.9, 95 S.Ct. at 739 n.9.

The basic requirement of impartiality is discussed in Chapter III.E. The right to a presumption of innocence, rather than a presumption of guilt, is discussed in Chapter III.F.7. On separating the finding of guilt or innocence from the later determination of what action to take, see Chapter III.G.1.

5. "Unusual Situations" Requiring Additional Procedures

Nor do we put aside the possibility that in unusual situations, although involving only a short suspension, something more than the rudimentary procedures will be required.

Goss v. Lopez, 419 U.S. 565, 584, 95 S.Ct. 729, 741 (1975).

The Supreme Court has stated that the opportunity to be heard "is an opportunity which must be granted at a meaningful time and in a meaningful

manner." Armstrong v. Manzo, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191 (1965). In "unusual" situations, the right to meaningful due process may require adequate time to prepare in addition to rights such as representation by counsel and the right of cross-examination.

To assess the procedures required by the due process clause in the "unusual" situation, an advocate must use the three factors of Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893 (1976). The Supreme Court has adopted a method which weighs the following factors to determine "what process is due": (1) the private interest at stake; (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards;" and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens" which additional procedures would impose. *Id.* at 335, 96 S.Ct. at 903. When applying these factors to short suspensions, note the statement in Goss that "the timing and content of the notice and the nature of the hearing will depend upon appropriate accommodation of the competing interests involved." 419 U.S. at 579, 95 S.Ct. at 738-39. Thus, the bare minimum requirements stated in Goss for any suspension hearing should not be regarded as a bar to additional procedures when warranted by the Mathews v. Eldridge analysis.

Application of the Mathews factors to school discipline is discussed in detail, with other case citations, in Chapter I.C.4., 5., "What Kind of Due Process."

Factual disputes, unusual injury, and other special circumstances may give rise to situations in which more than rudimentary procedures should be required.

(a.) Factual Disputes

Under the second factor in Mathews, significant factual disputes should trigger additional procedures, such as bringing in eyewitnesses to the incident, giving both sides a chance to question each other formally, etc. Without these additional procedures the administrator will have no real basis for a decision, other than improper reliance on the presumption that the student is always wrong and the staff always right. Cases and commentators supporting the need for more procedures where factual issues are in dispute are cited in §IX.B. of the Center's 1982 manual *School Discipline and Student Rights*, in the subsection titled "Kinds of Procedures Needed to Minimize Mistakes."

Pegram v. Nelson, 469 F.Supp. 1134, 1137, 1138-39 (D.N.C. 1979) involved a ten day suspension and exclusion from extracurricular activities, for theft of a wallet. When the student initially denied involvement, the principal provided further procedures and undertook additional investigation.

(b.) Short Suspensions Resulting in "Unusual" Injury to Student's Interests

Certain short suspensions, even when of the same length as the "usual" suspensions discussed in Goss, may involve greater deprivations of property or liberty interests. The increased severity of the deprivation requires more extensive protection under the first factor in Mathews, the private interests at stake. This could include, for example, short suspensions in which:

- the charges which will be recorded are unusually damaging to the student's liberty interest in his or her reputation (such as criminal or sexual misconduct);
- other constitutional rights, such as the right of free expression, are at stake;
- the student will miss a particularly important event, such as an exam which he or she will not be permitted to make up or an important extracurricular event;
- academic penalties are imposed, such as grade reductions or zeros for each day of absence.

In cases where the student loses credit for a course or a term because of the suspension (through grade reductions or denial of opportunity to make up exams), the suspension arguably should be treated, for due process purposes, as functionally equivalent to exclusion for the entire duration of the course rather than for only a few days.

Cases and comments considering the need for more procedures in the face of these additional injuries are found in Chapter I.C.4.(a.), in the subsection titled "The Private Interests at Stake."

(c.) Other Situations Warranting More Procedures

Using the Mathews analysis, it can be argued that more procedural protection should be provided in two other situations:

- where serious issues of fairness have been raised, such as charges of racial prejudice in the discipline process; and
- where evidence presented in the disciplinary hearing may be used in a pending juvenile court proceeding with much more serious consequences (in which case protection of the student might require the right to an attorney, exclusion of improperly acquired evidence, protection against self-incrimination, etc.).

6. Pre-Goss Decisions Granting More Extensive Rights

Certain lower courts, prior to the ruling in Goss, applied more extensive procedural requirements to exclusions of less than ten days, even without "unusual" circumstances. These cases are still valid for suspensions beyond ten days. See cases cited throughout Chapter III, "Specific Elements of Due Process." Further, the discussion above points to the need for some of these procedures in the "unusual situations" to which the Court alludes.

7. Decisions Holding that Procedures Satisfied Goss Standards

The procedures utilized by school officials in imposing suspensions not exceeding ten days were held to satisfy the Goss standards in the following decisions:

- Rosenfeld v. Ketter, 820 F.2d 38, 40 (2d Cir. 1987);
- Keough v. Tate County Board of Education, 748 F.2d 1077, 1080 (5th Cir. 1984);
- Webb v. McCullough, 828 F.2d 1151, 1159 (6th Cir. 1987);
- Lamb v. Panhandle Community Unit School District No. 2, 826 F.2d 526, 528 (7th Cir. 1987);
- Boster v. Philpot, 645 F. Supp. 798, 804-05 (D. Kan. 1986);
- Katchak v. Glasgow Independent School System, 690 F. Supp. 580, 582-83 (W.D. Ky. 1988);
- Darby v. Schoo, 544 F. Supp. 428, 436 (W.D. Mich. 1982);
- Bystrom v. Fridley High School, 686 F. Supp. 1387, 1394-95 (D. Minn. 1987);
- Reasoner v. Meyer, 766 S.W. 2d 161, 164 (Mo. App. 1989).

See also:

- Swany v. San Ramon Valley Unified School District, 720 F. Supp. 764, 776 n.9 (N.D. Cal. 1989) (exclusion from graduation ceremony and delay in receipt of diploma).

B. LONG-TERM SUSPENSION AND EXPULSION

After discussing procedures applicable to suspensions not exceeding ten days, the Supreme Court noted, "Longer suspensions or expulsions for the remainder of the school term, or permanently, may require more formal procedures." Goss v. Lopez, 419 U.S. 565, 584, 95 S.Ct. 729, 741 (1975). This is consistent with the Court's general analysis in Mathews v. Eldridge for determining what procedures are required: the first factor to be considered is the private interest at stake. 424 U.S. 319, 335, 96 S.Ct. 893, 903 (1976); see analysis in Chapter 1.C.4.(a), "What Kind of Due Process." In addition to finding that a short suspension is a serious deprivation of property and liberty interests, the Court in Goss also noted, "A short suspension is of course a far milder deprivation than expulsion." 419 U.S. at 576, 95 S.Ct. at 737.

Courts applying the principles set forth in Goss have at times found that more extensive procedural safeguards are required for exclusions that exceed ten days.

See:

- Jackson v. Franklin County School Board, 806 F.2d 623, 631 (5th Cir. 1986) ("Suspensions exceeding ten days require more formal procedures," citing Goss);
- Dillon v. Pulaski County Special School District, 468 F. Supp. 54, 57-58 (E.D. Ark. 1978), aff'd 594 F.2d 699 (8th Cir. 1979) (expulsion);
- Gonzales v. McEuen, 435 F. Supp. 460, 466-467 (C.D. Cal. 1977) (expulsion for remainder of year);
- M. v. Board of Education, 429 F. Supp. 288, 290 (S.D. Ill. 1977) (expulsion);
- Quintanilla v. Carey, C.A. No. 75-C-829 (N.D. Ill. Mar. 31, 1975) (Mem. Opin. and Order, pp. 5-6) (Clearinghouse No. 15,369A) (expulsion with opportunity to be in G.E.D. night program);
- PUSH v. Carey, C.A. Nos. 73-C-2522 and 74-C-303, (N.D. Ill. Nov. 5, 1970) (Slip Opin., p. 8) (Clearinghouse No. 17,507A), rev'd in part on other grounds sub nom. Piphus v. Carey, 545 F.2d 30 (7th Cir. 1976) (reversed because of court's failure to award damages to students), rev'd on other grounds, 98 U.S. 1042, 98 S.Ct. 1042 (1978) (reversed court of appeals on damages issue) ("suspensions potentially exceeded 10 days triggering the need for more formal procedures");
- Anderson v. Seckels, C.A. No. 75-65-2 (S.D. Iowa 1976) (Mem. and Opin., p. 15) (Clearinghouse No. 21,627C) (six-month suspension);
- Darby v. Schoo, 544 F. Supp. 428 (W.D. Mich. 1982) (indefinite suspension, expulsion);

- Cole v. Newton Special Municipal Separate School District, 676 F. Supp. 749, 752 (S.D. Miss. 1987) (in-school suspension, when added to time student was excluded from school, would exceed ten days);
- Morale v. Grigel, 422 F. Supp. 988, 1002 (D.N.H. 1976) (exclusion beyond ten days);
- Bleicker v. Board of Trustees of Ohio State, 485 F.Supp. 1381, 1387-88 (S.D. Ohio 1980) (two-term disciplinary dismissal from veterinary school);
- Diggles v. Corsicana Independent School District, 529 F. Supp. 169, 172 (N.D. Tex. 1981) (suspension for remainder of term);
- Reasoner v. Meyer, 766 S.W. 2d 161, 163, 166 (Mo. App. 1989) (two consecutive ten-day suspensions);
- Giles v. Redfern, C.A. No. __, Slip Op. at 11-12 (N.H. Super. Ct., Cheshire County, Jan. 18, 1977) (Clearinghouse No. 20,624A) (suspension for remainder of semester).

The many decisions prior to Goss which required extensive procedures for exclusions of various lengths remain valid law within their jurisdictions, at least as applied to exclusions beyond ten days. One example of adherence to stare decisis is Morale v. Grigel, 422 F. Supp. 988, 1002 (D.N.H. 1976), in which the court referred to its pre-Goss decision regarding requirements for lengthy suspensions:

This court has already addressed the issue of what process is due in a school disciplinary hearing. Vail v. Board of Education of Portsmouth School Dist., 354 F. Supp. 592, 603-604 (D.N.H. 1973), aff'd in part, 502 F.2d 1159 (1st Cir. 1973). It is against this standard of due process that I must measure the process received by Morale.

Additional decisions are cited throughout Chapter III, "Specific Elements." For substantive challenges to suspensions and expulsions, see §VIII.A., "Exclusion (Suspension, Expulsion, Etc.);" in the Center's 1982 manual *School Discipline and Student Rights*.

In some situations involving suspensions in excess of ten days, school district or institutional rules provided for more extensive procedural safeguards than those detailed in Goss, but students did not prevail in claims that additional safeguards should have been provided.

See:

- Gorman v. University of Rhode Island, 837 F.2d 7, 15-16 (1st Cir. 1988);
- Keough v. Tate County Board of Education, 748 F.2d 1077, 1079, 1081-82 (5th Cir. 1984);
- Newsome v. Batavia Local School District, 842 F.2d 920, 921-22, 924-26 (6th Cir. 1988);

- Jaksa v. Regents of University of Michigan, 597 F. Supp. 1245, 1250-54 (E.D. Mich. 1984), aff'd 787 F.2d 590 (6th Cir. 1986).

The Newsome case, *supra*, is criticized by Donal M. Sacken in "Due Process and Student Discipline," 50 *Education Law Reporter* 305 (Feb. 2, 1989).

C. DISCIPLINARY TRANSFER

I conclude that such transfers [lateral transfers from one nondisciplinary school to another] involve protected property interests of the pupils and are of sufficient significance as to warrant the shelter of due process protection....

In theory a transfer from one school to another within the same school district does not reduce the educational opportunities of the transferred pupil. All schools are intended to be approximately equal as to educational quality and physical facilities offered.... There is no inherent right of the pupil to attend the school of his or her choice, or the choice of the parents, within the school district....

[A] transfer during the school year has, at least to many pupils, a serious adverse impact upon their educational progress. The terminology of a 'disciplinary' transfer suggests punishment. Even though such transfers may in certain specific instances be for the good of the pupil as well as the transferring school, it nonetheless bears the stigma of punishment....

A suspension, under Goss, 'is a serious event in the life of the suspended child.' No less so is a disciplinary transfer to another school 'a serious event in the life the [transferred] child.' Goss v. Lopez, [419 U.S. 565] at 576, [95 S.Ct. 729, 737]. To transfer a pupil during a school year from a familiar school to a strange and possibly more distant school would be a terrifying experience for many children of normal sensibilities. I think it not melodramatic to suggest the genuine danger of physical harm being intentionally inflicted upon a transferred pupil who may be required to pass through different and strange neighborhoods on the way to and from the transferee school. Any disruption in a primary or secondary education, whether by suspension or involuntary transfer, is a loss of educational benefits and opportunities. Realistically, I think many if not most students would consider a short suspension a less drastic form of punishment than an involuntary transfer, especially if the transferee school was farther from home or had poorer physical or educational facilities.

Everett v. Marcuse, 426 F. Supp. 397, 400 (E.D. Pa. 1977)

Several courts have held that students subject to disciplinary transfers to other schools are deprived of significant property or liberty interests and are entitled to notice and due process hearings similar to those required for expulsions.

See:

- Jordan v. School District of City of Erie, Pennsylvania, 583 F.2d 91 (3d Cir. 1978) (modifying and approving consent decree);
- Betts v. Board of Education, 466 F.2d 629 (7th Cir. 1972);
- Mills v. Board of Education, 348 F. Supp. 866, 880-883 (D.D.C. 1972);
- Quintanilla v. Carey, C.A. No. 75-C-829 (N.D. Ill. Mar. 31, 1975) (Mem. Opin. and Order, p. 5) (Clearinghouse No. 15,369A);
- Board of Education v. Scott, C.A. No. 176-814 (Mich. Cir. Ct., Wayne County, Jan. 12, 1972) (Clearinghouse No. 7,380C).

When the new school does not offer the same regular classroom program but is, rather, a continuation school or school for students with behavior problems, the impairment of protected interests warrants the same protection as for expulsions. In Quintanilla, *supra*, a federal district court held that a formal hearing was necessary for students facing expulsion, before an impartial hearing officer who is not be an administrator from a student's school. The court continued:

Although defendants have offered to place plaintiff in a G.E.D. night school program, he has been absolutely denied --without a hearing - the right to obtain a standard high school diploma and the right to attend Kelvyn Park. Considering the Board's transfer policy and the fundamental differences between a G.E.D. certificate and a standard diploma, this amounts to the functional equivalent of an absolute expulsion.

See:

- Jordan v. School District, *supra*, 583 F.2d 91 (3d Cir. 1978) (modifying and approving consent decree) (transfer, usually for limited time, to special school for disruptive students);
- Taylor v. Maryland School for the Blind, 409 F. Supp. 148, 152 (D. Md. 1976) ("A forced transfer from an educational institution for the handicapped to a custodial one should be governed by the due process clause");
- Chicago Board of Education v. Terrile, 47 Ill. App. 3d 75, 361 N.E.2d 778 (1977) (commitment to special school for truants violated due process rights by abridging liberties of association, privacy, and movement without

demonstrating that such commitment both would meet the student's need and was the least restrictive means available).

Cf.:

- Vitek v. Jones, 445 U.S. 480, 491-94, 100 S.Ct. 1254, 1263-64 (1980) (prisoner has right to due process when transferred to a mental hospital for involuntary psychiatric treatment, in light of stigmatization and mandatory behavior modification program);
- Zamora v. Pomeroy, 639 F.2d 662, 668-70 (10th Cir. 1981) (court relied on similarity of educational program and absence of demonstrated academic harm in ruling that transfer for a semester did not violate procedural due process; unclear whether court was ruling that there was no entitlement to due process procedures or that student was so entitled but that in light of the above factors, the numerous hearings he received, at which he presented no evidence to challenge or mitigate the charges of possession of marijuana, were adequate).

Even when the new school is similar, there are likely to be subtle educational differences and possibly more burdensome travel, as well as loss of friends and teachers. See Everett v. Marcuse, *supra*, 426 F. Supp. 397 (E.D. Pa. 1977). Also, when a school administrator contemplates disciplinary transfer, the stigmatizing effects may be great because of the likely seriousness of the charges of misconduct. *Id.*

Further, specific property entitlements may be found in state and local laws, policies or practices mandating attendance at the student's regular school. For instance, a district's neighborhood school assignment plan may have created an objectively grounded expectation that when a family resides in a particular neighborhood, its children will attend a particular school. (Note too the extent to which a neighborhood's property values are often tied to a school's reputation.) See 20 U.S.C. §1701 (a): "The Congress declares it to be the policy of the United States that ... (2) the neighborhood is the appropriate basis for determining public school assignments." Similarly, a property interest in attending a particular school may be created by a district policy under which students attending a school one year normally will be able to attend it the next. See Perry v. Sindermann, 408 U.S. 593, 92 S.Ct. 2694 (1972), and the material on the creation of property interests in Chapter I.B.1.

In Kraut v. Rachford, 51 Ill. App. 3d 206, 366 N.E.2d 497 (Ill. Ct. App. 1979), a student was dropped from enrollment at a high school on grounds of non-residency. The court held that, although the student was left with the option of attending in a different district, he was deprived of a property interest and was therefore entitled to procedural due process. The court stated:

[T]he term "property" is broad enough to offer protection to an objective expectancy of the continuance of an interest which has been initially conferred by the state. Whether such an expectancy may be characterized as a "legitimate claim of entitlement" denoting objectivity, rather than an "abstract desire or need" denoting

subjectivity, depends on the statutory terms creating the interest as well as the rules or policies by which it is administered....

• • • •

Here, it cannot be questioned that the Illinois School Code conferred upon plaintiff an interest in attending a school on a tuition-free basis and that the retention of such a benefit is protected by the requirements of due process of law. The question remains, however, whether this protection is to be afforded his interest in remaining in H-F [the particular school] on a tuition-free basis. He had attended H-F during the 1973-74 school year as a tuition-free student, although one of his freshman enrollment forms indicated that he may not have been a resident of its attendance district since he lived with his aunt within the district rather than with his mother who resided in an adjacent school district. ...Under these circumstances, we believe that the actions of H-F in allowing him to attend on a tuition-free basis during his freshman year and further allowing him to proceed to final registration for his sophomore year, which encompassed a time period during which his living conditions remained constant, fostered an objective expectancy in his continuation at H-F on the same basis as before. Therefore, we hold that plaintiff was entitled to due process protection of his interest in continuing to attend H-F as a resident student.

Id. at 212-14, 366 N.E.2d at 501, 502-503 (citations omitted; emphasis in original). See also Hall v. Olha, C.A. No. B-80-407, (D. Conn., Feb. 24, 1984) (Slip Op., p. 5 (Clearinghouse No. 36,367A) ("Defendants' failure to provide plaintiffs with notice and an opportunity for a hearing before expelling the children [for nonresidency] violated the due process clause of the Fourteenth Amendment").

Thus, while it is necessary to demonstrate some property or liberty interest at stake when the student is transferred to another school, the absence of a constitutional right to attend a particular school is not a bar to due process claims. First, the state-granted entitlement to education creates a property interest (see Chapter I.B.1.); at least some transfers constitute a significant reduction in that entitlement when compared with the regular programs to which students across the state or within the district are otherwise entitled. Second, the state or local system may have created, through assignment policies and the like, a specific property interest in attending a particular school. Third, even in the absence of a property interest, a transfer may deprive a student of various liberty interests: restriction of freedom of association; foreclosure of future occupational opportunities; damage to reputation caused by the transfer; and, for transfer to certain types of "special" schools, intrusion on personal privacy or personal and physical security. See Chapter I.B.2. for a discussion of protected liberty interests.

Cf. Vitek v. Jones, 445 U.S. 480, 487-91, 100 S.Ct. 1254, 1261-63 (1980) (liberty interest is created where, through law or official practice, prisoner is given justifiable expectation that he will not be transferred except for misbehavior or upon the occurrence of other specified events; prisoner is thus entitled to

constitutionally adequate procedures in determining that the conditions have been met).

Finally, state statutes themselves may limit a school's ability to transfer students without certain procedures. In W.A.N. v. School Board of Polk County, 504 So. 2d 529 (Fla. Dist. Ct. App. 1987), the court ruled that a proposed disciplinary transfer was functionally equivalent to a suspension under Florida law. As school officials had not made "[a] good faith effort ... to employ parental assistance or other alternative measures prior to suspension" [as required under Fl. Stat. § 232.26(1)(b)], the suspension (transfer) was improper.

What Kind of Procedures

In establishing the particular procedures to which a student facing transfer is entitled, it becomes important for an advocate to stress the extent of the property and liberty deprivations, particularly as compared to either a suspension of one to ten days (which normally requires only informal notice and hearing) or a suspension of more than ten days (which entitles the student to relatively formal procedures). See Chapter I.C. on the factors for determining "what kind of due process."

Special Education Procedures

For certain kinds of transfers, procedures mandated by federal laws protecting handicapped students may also be required, either (1) because the student has already been classified as "handicapped" or referred for evaluation, or (2) because the program, while not so called by the school system, is really functioning in disguise as a special education program (*e.g.*, for students with "emotional problems"). For discussion, see §VIII.D, "Disciplinary Transfer," in the Substantive Rights portion of the Center's 1982 manual *School Discipline and Student Rights*.

Non-Disciplinary Transfers

A different analysis from the above is required for examining the due process claims of a student who is transferred as part of a general policy, such as integration or changes in school assignment districts, rather than for disciplinary reasons. First, if the policy is being carried out in order to meet the requirements of the Fourteenth Amendment, either under court order or voluntarily, then whatever state-granted entitlement the student might otherwise have is necessarily limited by those constitutional requirements. There may be other judicial or administrative avenues for challenging court-ordered or voluntary assignment plans, but these remedies are quite different from a claim of a due process right to a hearing before the school board when it draws up its plan. Second, even if the reassignment plan (as opposed to an individual placement) is not constitutionally mandated but is undertaken for general policy reasons, a due process claim would

likely be defeated under the principle that individuals do not have constitutional due process rights to be heard when the state is reaching a legislative or law-making, as opposed to an adjudicative, decision. Hunter v. City of Pittsburgh, 207 U.S. 161, 28 S.Ct. 40 (1907). Cf. Dawson v. Troxel, 17 Wash. App. 129, 561 P.2d 694 (Wash. Ct. App. 1977) (procedural due process was satisfied where, in revoking transfers of white students as part of desegregation plan, district notified students and provided opportunity for appeal).

Nevertheless, a school cannot escape its due process obligations by relabeling a disciplinary transfer as something else. Thus, in Everett v. Marcuse, *supra*, 426 F. Supp. 397, 400 (E.D. Pa. 1977), the court said:

Even though such transfers may in certain specific instances be for the good of the pupil as well as the transferring school, it nonetheless bears the stigma of punishment. The analogy between a transfer for the good of the pupil and a jail sentence for a convicted felon for "rehabilitation" is not entirely remote.

See also W.A.N. v. School Board of Polk County, *supra*, 504 So. 2d 529 (Fla. Dist. Ct. App. 1987) (transfer is functionally equivalent to suspension and label may not be used to circumvent statutory procedures). Similarly, in St. Ann v. Palisi, 495 F.2d 423, 427 (5th Cir. 1974), the court rejected the argument that transfer of students because their mother struck their teacher was not "punishment" and therefore did not raise due process issues.

Substantive Challenges to Transfers

See "Substantive Rights," §VIII.D, "Disciplinary Transfer" in 1982 edition of *School Discipline and Student Rights*.

D. IN-SCHOOL SUSPENSION

This article has noted that some alternative programs may entail unacceptable behavior control, and that individual liberties may be infringed by programs designed to bring behavior into conformity with a preconceived norm. Where these programs take the form of separate classes, their very existence may make schools and teachers more willing to give up on a student within the regular class framework....

Central to any alternative program should be due process determinations, and a parental/student option for exclusion rather than the proposed alternative. At least as much due process should be provided prior to "in-school suspension" as for traditional suspension in order to avoid incorrect or arbitrary determinations of misconduct. Some of the students who were placed in the small plywood booths mentioned at the outset of this article, for example, may have been right in feeling that they did not do anything wrong. And certainly, any alternative which takes the student out of regular classes for an extended period (say, ten days or more) should be preceded by the kind of formal due process required prior to expulsion from school.

Merle McClung, "Alternatives to Disciplinary Exclusion from School," 20 *Inequality in Education* 58, 68 (July, 1975).

Similar procedures are called for by Hayes Mizell in "Designing and Implementing Effective In-school Alternatives to Suspension," 10 *Urban Review* 213, 218-19 (1978). Mizell also recommends other screening and review procedures to avoid overuse of in-school suspension.

"In-school suspension" can become a vehicle for evading basic due process safeguards. Thus, it is important to argue for a definition of "suspension" as exclusion from the student's regular program, so that an "in-school suspension" is regarded as a form of suspension, rather than an alternative to suspension. In other words, a decision should first be made that a student's conduct warrants his or her suspension from his or her regular program. Only after that decision has been made should the student then be offered an in-school suspension as an alternative to total exclusion. See "Substantive Rights," §VIII.E, "In-School Suspension" in the Center's 1982 manual *School Discipline and Student Rights*, concerning consent requirements under which the student/parent is free to reject in-school suspension and choose full suspension instead.

In *Cole v. Newton Special Municipal Separate School District*, 676 F. Supp. 749 (S.D. Miss. 1987), the court refused to grant summary judgment for

defendants, finding that in-school isolation may require procedural protections under the due process clause. Following an out-of-school suspension, plaintiff Walsh returned to school and was required to remain isolated in detention room for six days, the duration of the school term. The court stated:

Defendants argue that since this [exclusion] was not a suspension, no procedural due process protection attached to this additional disciplinary action and that, in any event, the Goss requirements were met. It is not clear, however, that defendants' premise is correct. Defendants' position appears to be that because plaintiff was physically present on school grounds, the due process requirements for suspensions are not applicable. The court is of the opinion that the physical presence of a student at school is not conclusive as to whether school officials are excused from according a hearing in connection with imposing in-school isolation characterized by exclusion from the classroom. The Court in Goss spoke of suspension as "total exclusion from the educational process." Under certain circumstances, in-school isolation could well constitute as much of a deprivation of education as an at-home suspension. In other words, a student could be excluded from the educational process as much by being placed in isolation as by being barred from the school grounds. The primary thrust of the educational process is classroom instruction; in both situations the student is excluded from the classroom. This is not to say that any in-school detention would necessarily be equivalent to a suspension; it would depend on the extent to which the student was deprived of instruction or the opportunity to learn.

Id. at 751-52.

The court in Mills v. Board of Education, 348 F. Supp. 866, 880 (D.D.C. 1972), ordered disciplinary hearing procedures in situations which would apparently include in-school suspensions: "suspension, expulsion, postponement, inter-school transfer, or any other denial of access to regular instruction in the public schools to any child for more than two days." Moreover, the court required that any student so excluded must be provided with "adequate alternative educational services suited to the child's needs...." *Id.* at 878. In addition, the court held that, pending the hearing and notice of the decision, "there shall be no change in the educational placement" of the child, unless there is a determination of ongoing an threat to physical well-being of persons, in which case the student must receive "some form of educational assistance and/or diagnostic examination during the interim period...." *Id.* at 883.

Cf.:

- Wise v. Pea Ridge School District, 855 F.2d 560, 563 n.3 (8th Cir. 1988) (in-school suspension characterized in part by student's being given and completing all regular assignments; *de minimis* interference with student's interests);

- Cole v. Greenfield-Central Community Schools, 657 F. Supp. 56, 61 (S.D. Ind. 1986) ("isolation seating is a relatively innocuous disciplining technique...");
- Hayes v. Unified School District No. 377, 669 F. Supp. 1519, 1528 (D. Kan. 1987) (no procedural due process violation in connection with placement of students in room measuring 3 feet by 5 feet for "time-out periods and in-school suspensions"; during "in-school suspension ... student was to be working on classroom material"; students had "adequate notice to enable them to protect against being placed in the time-out room..."), vacated on ground that exhaustion of administrative remedies was required, 877 F.2d 809 (10th Cir. 1989);
- Dickens v. Johnson County Board of Education, 661 F. Supp. 155, 157-58 (E.D. Tenn. 1987) (particular form of isolation in "timeout box" within classroom was *de minimis* interference with student's interests and, therefore, school officials need not "conduct a formal, due process hearing before placing [student] in 'timeout'").

The existence of property or liberty interests affected by in-school suspension and the extent of the deprivation will depend largely upon three factors:

- the length of the suspension;
- the degree to which the program resembles either the student's normal educational program or an exclusion from any meaningful educational program;
- the degree to which the nature of the program involves deprivation of other liberty interests, *e.g.*, greater physical constraint or confinement, intrusions on personal privacy, curtailment of association with other students, damage to reputation, etc.

To the degree that the in-school suspension should be treated as any other short suspension, see Chapter II.A. for applicable procedures. To the degree that procedures applicable to long-term suspension should apply, see Chapter II.B. In assessing additional deprivations of liberty interests which are not present when the student is simply excluded from school, see Chapter II.C., "Disciplinary Transfer." On property and liberty interests generally, see Chapter I.B.-C. On determining the applicable form of due process generally, see Chapter I.C. For policy materials, see also §XIII.B., "Alternatives" in the Center's 1982 manual *School Discipline and Student Rights*. For related issues, see Chapter II.E., "Removal From Particular Classes."

See "Substantive Rights," §VIII.E, "In-School Suspension" in the Center's 1982 manual *School Discipline and Student Rights* for discussion of substantive challenges to in-school suspensions, including such issues as:

- substantive challenges applicable to any suspension;
- in-school programs which deprive students of fundamental liberties;
- holding-pen programs which compel attendance without minimally adequate education;
- requiring consent by student and parent before placement;
- racial segregation;
- procedures for students classified as handicapped or referred for evaluations;
- special education programs in disguise.

E. REMOVAL FROM PARTICULAR CLASSES

Removal from particular classes can range from loss of a single class period to exclusion from a course altogether, and the procedural due process necessary will vary accordingly. Loss of a single class period, or loss of anything less than the equivalent of a full day of school, might be regarded as *de minimis*, and thus subject to no due process requirements. See Edwards v. Rees, 883 F.2d 882, 885 (10th Cir. 1989) (removal of student from class for 20 minutes did not impact property interest). This might not be the case, however, if the student is sent even for a single period to a program which seriously intrudes on other liberty interests, such as bodily restraint or intrusions into privacy. See Chapter I.A.2. and Chapter II.D., "In-School Suspension," and cases cited therein.

Where the removals from class accumulate to the point that the student is excluded for the equivalent of one full day or more, an analysis similar to that for short in-school suspensions is probably appropriate. See Chapter II.D.

A student who is removed from a course altogether may have rights more analogous to those for disciplinary transfer. See Chapter II.C. The existence and extent of due process rights would turn in part on the degree to which the options left to the student were significantly reduced.

In Arundar v. DeKalb County School District, 620 F.2d 493 (5th Cir. 1980), a student allegedly was denied the right to enroll in certain courses of study, thereby blocking future access to higher education in a highly technical field. The court held that the plaintiff had not established a property interest because she had simply failed to allege "any 'independent source such as state statutes or [other] rules' entitling the plaintiff to the particular course of study which she claims has been denied her." *Id.* at 494.

The Arundar decision can be distinguished from and should not bar due process claims for disciplinary exclusions from courses. The student here was not excluded from courses in which she was enrolled, but was only refused admission to new classes. This is similar to a teacher having a property interest in his or her existing job, but not in a job for which he or she has only applied; or, as an enrolled university student is entitled to a hearing before being excluded for disciplinary reasons, an applicant generally has no hearing rights concerning rejection of his or her application. In addition, it may be possible to show, as was not done here, that the school has created, through its policies and practices, a legitimate expectation of continued enrollment in particular courses, or even a right to enroll. See Goldsmith v. United States Board of Tax Appeals, 270 U.S. 117, 123, 46 S.Ct. 215, 217 (1926). Further, the court here did not address the possible existence of liberty interests, including the interest in protection against government action which forecloses future employment opportunities. See Chapter I.B.2. There are also significant differences between disciplinary and academic decisions. Finally, note that the court held that the student's complaint should be dismissed without prejudice, permitting her to file a new cause of action.

Cf.

- Kelleher v. Flawn, 761 F.2d 1079 (5th Cir. 1985) (graduate student had no property or liberty interest in specific form of teaching assignment, so reassignment had no constitutional implications).

At the other end of the spectrum, the court in Jordan v. School District of City of Erie, 583 F.2d 91 (3d Cir. 1978), held that no student should be removed from class until after Goss-type informal notice and hearing procedures were provided by the principal, unless the teacher and the principal agree that the student's presence poses an ongoing danger of harm to persons or property or ongoing threat of disruption. In such a case the student may be removed immediately, with the hearing to follow within three days.

F. EXCLUSION FROM EXTRACURRICULAR ACTIVITIES

1. Overview

"Extracurricular activities are a settled part of school life. They often override the regular curriculum in maintaining student interest in school and are a vital element in the overall educational program. As a result, educators should carefully consider extracurricular programs and be aware of the legal issues involved. Although there is divided opinion over the legal relation of extracurricular activities to the total school program, expulsions from activities are grievous losses to students, psychologically and legally."

Edward L. Winn, III, "Legal Control of Student Extracurricular Activities," 7 *School Law Bulletin* (No. 3) 1, 10 (July 1976).

Once again, the key to due process analysis is to first establish property or liberty interests (as described in Chapter I.A., B.) and then apply the factors of Mathews v. Eldridge (Chapter I.C.4.-5.) to determine what process is due. While the focus of this manual is discipline, exclusions from extracurricular activities arise in several different contexts, with the existence of a protected interest the common starting point for analysis. These contexts are (1) removal from an activity as a sanction for misconduct in the educational institution generally; (2) removal from an activity as a sanction for misconduct connected with the extracurricular activity; (3) denial of participation in an activity or removal from it for failure to satisfy an eligibility rule (for example, a required waiting period for participation in athletics after a transfer from one school to another); (4) denial of participation in an activity, or removal from it, for failure to satisfy an academic eligibility rule (for example, failure to maintain a particular average); and (5)

miscellaneous situations (such as denial of admission to an honor society). Cases in each of these categories are listed below.

The cases involving removal from extracurricular activities for disciplinary reasons are markedly by recurring problems in courts' application of the legal standards governing identification of protected interests. First, interpretation and application of Goss v. Lopez is flawed. Second, courts often fail to canvass the possible sources of "protected interests" identified by the Supreme Court. Third, holdings in eligibility cases are cited in support of rulings that there are no protected interests in discipline cases, although there are bases for distinguishing these situations. These problems are discussed after the summarization of prior decisions.

2. Summaries of Decisions

(a.) Exclusion as a Sanction for Misconduct in the Educational Institution Generally

Protected Interest Assumed or Recognized

- Palmer v. Merluzzi, 868 F.2d 90, 95-96 (3d Cir. 1989) (10-day academic suspension and 60-day suspension from football team for violation of high school substance abuse policy; majority "accepts for present purposes Palmer's contention that, while called an extracurricular activity, the school's football program is an integral part of its educational program", concluding that a hearing satisfying Goss v. Lopez standards addressed the 60-day suspension and was adequate and that there was no infringement of liberty interest in good name and reputation where Palmer did not challenge his guilt; Circuit Judge Cowen, dissenting, concluded that the "New Jersey Supreme Court ... would [today] recognize a protected interest in participation in extracurricular activities", and that there was only the "mere illusion of an opportunity to be heard" on the 60-day exclusion; *id.* at 99, 101 (Cowen, C.J., dissenting));
- Pelley v. Fraser, C.A. No. B-76-C-14 (E.D. Ark., May 18, 1976) (Clearinghouse No. 19,518A) (high school student was removed from student council president position for completing English assignment in language which teacher found crude; existence of protected interest recognized implicitly; "there [was] a serious due process question presented";
- Brands v. Sheldon Community School, 671 F. Supp. 627, 631 (N.D. Iowa 1987) (removal from high school wrestling team for mistreating another student; court seems to conclude that the school district's "Disciplinary Policy and Administrative Rules" gave rise to "a property right" which, in this case, was not denied; moreover, assuming "a protected interest," "plaintiff received all process due to him");
- Warren v. National Association of Secondary School Principals, 375 F. Supp. 1043, 1047, 1048 (W.D. Tex. 1974) (dismissal from National Honor Society for drinking beer implicated student's liberty interest in his "good name,

reputation, honor, or integrity" and "could very well have adverse effects on his future, including his further educational and employment careers"; student denied the "opportunity to be heard before a fair and impartial tribunal of some nature...");

- DePrima v. Columbia-Green Community College, 392 N.Y.S.2d 348 (N.Y. Sup. Ct. 1977) (student facing, inter alia, disciplinary probation, thereby depriving him of participation in student activities, was denied due process where he was not allowed to confront and cross-examine opposing witnesses and call his own witnesses);
- Ector County Independent School District v. Hopkins, 518 S.W.2d 576 (Tex. Civ. App. 1974) (dismissal without notice or hearing from National Honor Society and another high school organization for receiving one-day suspension denied student's due process rights; violations cured by adequate school board hearing).

Protected Interest Not Recognized

- Makanui v. Department of Education, 721 P.2d 165, 170 (Hawaii App. 1986) (suspension from high school track team for setting off fireworks on school grounds; no protected interest).

(b.) Exclusion as a Sanction for Misconduct Connected with the Extracurricular Activity

Protected Interest Recognized

- Boyd v. Board of Directors, 612 F. Supp. 86 (E.D. Ark. 1985) (suspension from high school football team for boycott due to perceived racial discrimination; facts as to this particular plaintiff demonstrated that "participation in high school sports [was] vital and indispensable to a college scholarship and...a college education."; therefore, he had a "property interest," which was denied without due process of law);
- Behagen v. Intercollegiate Conference of Faculty Representatives, 346 F. Supp. 602 (D.Minn. 1972) (exclusion of two "Big Ten" basketball players from participation in games and practice, following altercation, conceded to impinge on "substantial [interest]" "to participate in intercollegiate athletic competition at one of [the] member institutions..."; permanent exclusion from practices was accomplished without due process of law; while exclusion from games for a brief period to preserve status quo was permissible, prompt affording of extensive procedural rights must precede long term exclusion);
- Davis v. Central Dauphin School District School Board, 466 F. Supp. 1259 (M.D.Pa. 1979) (because athletic policies imply that student could participate in high school athletics unless at the very least the policies were violated, the student arguably had a property interest in participation; in this case, adequate procedures were provided);

- Kelley v. Metropolitan County Board of Education, 293 F. Supp. 485, 493 (M.D. Tenn. 1968) (exclusion of high school from interscholastic athletics for one year for misconduct at tournament game "infringe[d] upon a facet of public school education which has come to be generally recognized as a fundamental ingredient of the educational process"; "...absence of a formal charge, followed by a hearing, against any particular school or individual [for] misconduct" denied procedural due process rights);
- Braesch v. DePasquale, 265 N.W.2d 842 (Neb. 1978) (exclusion from high school basketball team for violation of team substance abuse rule implicated a "significant" interest of students, the State having undertaken to "[provide] athletic opportunities to all public school students" "as a part of its program for public education"; assuming a protected interest was implicated, adequate procedural protections were provided).

Protected Interest Not Recognized

- Poling v. Murphy, 872 F.2d 757, 764 (6th Cir. 1989) (exclusion from student council election due to content of speech to assembly; no protected interest; moreover, adequate procedural protections provided);
- Hysaw v. Washburn University of Topeka, 690 F. Supp. 940 (D. Kan. 1987) (removal from football team after boycott to protest alleged racial discrimination in scholarships; no property right to play football; no liberty interest to pursue football career at another school);
- Haverkamp v. Unified School District No. 380, 689 F. Supp. 1055 (D. Kan. 1986) (removal without notice or hearing from position as head cheerleader for taking trip without permission of advisors; no "federally-protected property interests");
- Davis v. Churchill County Board of Trustees, 616 F. Supp. 1310, 1314, n.3 (D. Nev. 1985) (suspension from extracurricular activities for remainder of year for fighting at game at which plaintiffs were spectators; no liberty or property interest);
- Pegram v. Nelson, 469 F. Supp. 1134, 1140 (M.D.N.C. 1979) (student excluded from after-school activities for remainder of year for stealing wallet at basketball game received adequate due process, assuming there was a protected interest at stake; court indicated, without deciding the issue, that there was no property interest at stake, but stated that "total exclusion from participation in that part of the educational process designated as extracurricular activities for a *lengthy period of time* could, depending upon the particular circumstances, be a sufficient deprivation to implicate due process");
- Bernstein v. Menard, 557 F. Supp. 90 (E.D. Va. 1982) (discipline for incident in high school band; if there was a protected interest, procedures satisfied due process requirements); appeal dismissed in pertinent part, 728 F.2d 252 (4th Cir. 1984);
- N.C.A.A. v. Gillard, 352 So. 2d 1072 (Miss. 1977) (student-athlete ineligible for collegiate football due to receiving clothes at a discount; procedures protected student's interest and he had no property interest).

(c.) **Exclusion Due to Failure to Satisfy Non-Academic Eligibility Rule**

Protected Interest Recognized

- Duffley v. N.H. Interscholastic Athletic Assoc., 446 A.2d 462, 466-67 (N.H. 1982) (denial of additional year of high school athletic eligibility; consideration of State regulations, Association goals, and "common sense recognition of the benefits, both educational and economic, that frequently accrue to those high school students who participate in interscholastic athletic competition" leads to the conclusion "that the right of a student to participate in interscholastic athletics" is protected by state procedural due process safeguards).

Note: Protected interests have been recognized where equal protection claims were raised. See, e.g., ABC League v. Missouri State High School Activities Ass'n, 530 F. Supp. 1033, 1044, 1047 (E.D. Mo. 1981) (Student's "interest in participating in interscholastic sports is substantial and significant;" repeal of exemption from transfer rule was arbitrary and capricious); Chabert v. Louisiana High School Athletic Association, 323 So. 2d 774, 777 (La. 1975) (where student challenged athletic transfer rule, court rejected the contention that, because participation is a privilege not a right, there is no constitutional issue; court found a rational relationship in this case, and thus no denial of equal protection). However, equal protection claims may be distinguishable; i.e., an individual is entitled to be treated like other similarly situated persons, absent the requisite justification, irrespective of whether the particular activity involves a protected interest.

Protected Interest Not Recognized

- Hebert v. Ventetuolo, 638 F.2d 5 (1st Cir. 1981) (residence requirement; question of fraudulent guardianships);
- Walsh v. Louisiana High School Athletic Association, 616 F.2d 152, 159 (5th Cir. 1980), *cert. denied*, 449 U.S. 1124 (1981) (transfer rule);
- Hamilton v. Tennessee Secondary School Athletic Association, 552 F.2d 681 (6th Cir. 1976) (high school transfer rule);
- Colorado Seminary (University of Denver) v. N.C.A.A., 570 F.2d 320 (10th Cir. 1978) (receipt by athletes of room and board expenses);
- Albach v. Odle, 531 F.2d 983 (10th Cir. 1976) (high school transfer rule);
- Davenport v. Randolph Board of Education, 730 F.2d 1395, 1396-97 (11th Cir. 1984) (requirement of being "clean shaven" to participate on high school football and basketball teams; no protected interest);

- Kulovitz v. Illinois High School Association, 462 F. Supp. 875 (N.D. Ill. 1978) (transfer rule);
- Fluitt v. University of Nebraska, 489 F. Supp. 1194, 1202-03 (D. Neb. 1980) (denial of additional year of athletic eligibility; court seems to find no protected interest; moreover, assuming presence of a protected interest, plaintiff was accorded due process);
- Williams v. Hamilton, 497 F. Supp. 641, 645 (D.N.H. 1980) (transfer rule at college level);
- Dallam v. Cumberland Valley School District, 391 F. Supp. 358 (M.D. Pa. 1975) (transfer rule);
- Tiffany v. Ariz. Interscholastic Association, 729 P.2d 231, 234-36 (Ariz. App. 1986) (denial of waiver of maximum age eligibility rule; while "serious damage to ... 'later opportunities for higher education and employment'" would present due process issue, here student asserted "claim to mere participation in one year of interscholastic sports");
- Smith v. Crim, 240 Ga. 390, 240 S.E.2d 884 (Ga. 1977) (number of semesters of eligibility; high school);
- Pennsylvania Interscholastic Athletic Assoc. v. Greater Johnstown School District, 463 A.2d 1198 (Pa. Commw. Ct. 1983) (exclusion from high school team for athletically motivated transfer; no property right to participate in athletics; no equal protection violation);
- Simpkins v. South Dakota High School Activities Association, 434 N.W.2d 367 (S. Dak. 1989) (athletic ineligibility due to transfer rule; no protected interests; in addition, procedure provided satisfied any procedural due process requirements);
- Sullivan v. University Interscholastic League, 599 S.W.2d 860, 863 (Tex. Civ. App. 1980) (high school transfer rule).

Note: For citations of other decisions in eligibility cases, finding no protected interest, see Palmer v. Merluzzi, 689 F. Supp. 400, 408-09 (D.N.J. 1988).

(d.) Exclusion for Failure to Satisfy Academic Eligibility Rule

No Protected Interest

- Parish v. N.C.A.A., 506 F.2d 1028, 1034 (5th Cir. 1975) (requirement of predicted grade point average of at least 1.6 to participate in N.C.A.A. sponsored tournaments or televised games; no protected interest);
- Thompson v. Fayette County Public Schools, 786 S.W. 2d 879, 882 (Ky. App. 1990) (requirement of 2.0 grade point average in five of six classes to

remain eligible for high school extracurricular activities; "no property or liberty interest");

- Spring Branch I.S.D. v. Stamos, 695 S.W.2d 556, 558, 561 (Tex. 1985) (requirement of "70 average" in all academic classes to participate in "any extracurricular activity sponsored or sanctioned by the school district..." (emphasis added); "We are in agreement ... with the overwhelming majority of jurisdictions that students do not possess a constitutionally protected interest in their participation in extracurricular activities");
- Bailey v. Truby, 321 S.E.2d 302, 305, 313-16 (W. Va. 1984) [requirement of passing grades and "C" average to participate in *nonacademic* extracurricular activities; no "constitutionally protected 'property' or 'liberty' interest"; the court expressly limit[ed] its holdings in these actions to nonacademic extracurricular activities, such as interscholastic athletics and cheerleading. On the other hand, because they are closely related to identifiable academic courses of study, and serve to complement academic curricular activities, students *may not be excluded*, on the basis of grade point average, from vocational, linguistic, mathematic, scientific, forensic, theatrical, musical, journalistic, and other similar *academic extra-curricular activities...*" (footnote omitted)].

(e.) Miscellaneous Decisions / No Protected Interest

- Rutledge v. Arizona Board of Regents, 660 F.2d 1345, 1352-53 (9th Cir. 1981) (college student had no protected interest in maintaining a particular position on the football team [note that this is quite a different claim than those concerning disciplinary exclusions from activities for which students are otherwise eligible]);
- Price v. Young, 580 F. Supp. 1, 2 (E.D. Ark. 1983) ("Membership in the National Honor Society does not give rise to a property interest which entitles one to due process of law"; student not admitted as a result of anonymous evaluations);
- Hawkins v. National Collegiate Athletic Association, 652 F. Supp. 602, 610-11 (C.D. Ill. 1987) (sanctions imposed for university violations of N.C.A.A. rules; there is no property or liberty interest in participating in interscholastic athletics; no property interest in participation in post-season competition, or gaining tournament experience or media exposure; and future professional careers are mere expectations not worthy of due process protection);
- Boster v. Philpot, 645 F. Supp. 798, 806 (D. Kan. 1986) ("attending interscholastic athletic games as a spectator is not a constitutionally protected right"; students had engaged in vandalism);
- Karnstein v. Pewaukee School Board, 557 F. Supp. 565 (E.D. Wis. 1983) (applicant for membership in National Honor Society has no property or liberty interest in election to society; procedures used were fair).

3. Analysis of Decisions

Overall, the decisions concerning protected interests and extracurricular activities are marked by error. Courts do not justify their rejections of students' claims by evidence showing that a "deprivation is ... *de minimis* ..." [*Goss v. Lopez*, 419 U.S. 565, 576-77, 95 S. Ct. 729, 737 (1975)], a basis for avoiding procedural requirements. *Id.* Moreover, material cited below demonstrates that it would be difficult to conclude that interests are *de minimis*. Once the *de minimis* hurdle is crossed, the weight of interests is relevant solely to deciding what process is due. *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976). Yet, a *sub rosa* view that participation in athletics and other extracurricular activities is not important enough to warrant imposition of procedural requirements appears to be at work. Lastly, it does not appear that requiring adherence to the procedural safeguards specified in *Goss* would be particularly burdensome, a fact evidenced by the number of occasions in which courts conclude, alternatively, that school officials satisfied any due process procedural requirements.

Three types of errors permeate the decisions.

(a.) Erroneous Applications of the *Goss* Decision

The extent to which participation in extracurricular activities is a meaningful component of the "entitlement to a public education" recognized as a predicate for due process protection in *Goss v. Lopez*, 419 U.S. 565, 573 (1975), has generally been treated unsatisfactorily. Often, courts do not discuss at all the educational content of extracurricular activities. *E.g.*, *Poling v. Murphy*, *supra*, 872 F.2d at 764; *Davis v. Churchill County Board of Trustees*, *supra*, 616 F.Supp. at 1314 n.3; *Makanui v. Dept. of Education*, *supra*, 721 P.2d at 170 (Hawaii). However, this content can be shown readily.

First, it is apparent and well recognized that athletic and other extracurricular activities, such as student council and photography club, have the potential for addressing one or more educational goals, such as physical fitness, general intellectual growth, leadership skills, public speaking skills, personal discipline, sportsmanship, and interpersonal development. These activities provide an opportunity for a student to form a positive relationship with the school, which may become generalized. An advocate faced with a particular case should study a variety of materials for evidence of the recognition of the educational content of activities. These include state statutes; state regulations; local school goal statements, philosophies, policies, and budgets; school handbooks; state and other audit and accreditation standards; and athletic association documents.

In *Parrish v. Moss*, 106 N.Y.S. 2d 577 (N.Y. Supreme Court 1951), *aff'd* without opinion, 107 N.Y.S. 2d 580 (N.Y. App. 1981), the court rejected a challenge to regulations providing for school principals to assign "[e]very teacher...to give [required] service outside of regular classroom instruction...." *Id.*, 106 N.Y.S. 2d at 580. The opinion quoted at length from an affidavit of the superintendent of the New York City schools, as follows (106 N.Y.S. 2d at 583):

As the Court is well aware the New York City public school system has for years furnished its pupils an education not only through formal classroom teaching but also by means of a school activity program where the child learned to participate with other children in endeavors which were guided by the teachers. These activities included athletic contests both intra school and inter schools, the running of a school paper, dramatic plays, mathematic, science, music and various other kinds of clubs, assembly programs, commencement exercises, meetings with parent groups and individual parents, etc. All of these activities coupled with the classroom teaching help to develop the child's aptitudes and teach him to be a good citizen. The after-school program was carried on in the elementary schools, junior high schools and high schools largely, though not entirely, on a volunteer basis. This system functioned well because each teacher volunteered to help the pupils in the activity which the teacher enjoyed. However, the principals of the schools had the power under section 90, subd. 20 of the By-Laws to assign a teacher to a certain school activity when volunteers were not available. *** The regulations also state that there is an area of teacher service which is important to the well rounded educational program of the students. This area of service includes the training of dramatic and music groups, leadership of clubs of various kinds, supervision of athletic contests and other school activities, participation in commencement activities, etc. The principal of each school is charged under the regulations with the responsibility of carrying out this latter part of the school program. This I believe is a sound administrative practice. Each school is of necessity a separate and distinct unit with the principal at its head. He is charged with the efficient operation of the schools. He knows the teachers in his school and is aware of the abilities of the various teachers. The principal is obviously in a far superior position to select a teacher to supervise the school paper, or the school play, or the school athletic contests. It is absurd to suggest that I as Superintendent of Schools having under my jurisdiction some 35,000 teachers could set up rules to govern the selection of these teachers.

Second, courts have found extracurricular activities to be an integral part of the educational process in a wide variety of cases.

Cases Concerning School Fees

- Hartzell v. Connell, 679 P.2d 35, 38-43 (Cal. 1984) [(This case involved fees for athletic teams, dramatic productions, vocal music groups, instrumental groups, and cheerleading groups); "[T]his court holds that all educational activities - curricular or 'extra-curricular' - offered to students by school districts fall within the free school guarantee of article IX, section 5. Since it is not disputed that the programs involved in this case are 'educational' in character, they fall within that guarantee" (footnote omitted)];
- Pachecho v. School District No. 11, 183 Colo. 270, 516 P.2d 629 (1973) (some recognition of educational role of extracurricular activities by trial court and individual justices, although appeal dismissed by court majority);
- Bond v. Public Schools of Ann Arbor School District, 383 Mich. 693, 178 N.W.2d 484, 488 (1970).

But see:

- Paulson v. Minidoka County School District No. 331, 463 P.2d 935, 938 (Idaho 1970).

Cases Concerning the Rights of Students Who Are Married, Pregnant, or Parents to Participate in Extracurricular Activities

- Moran v. School District No. 7, 350 F. Supp. 1180, 1183-84 (D. Mont. 1972);
- Johnson v. Board of Education of the Borough of Paulsboro, C.A. No. 172-70 (D.N.J., Apr. 14, 1970) (Clearinghouse No. 3018E);
- Davis v. Meek, 344 F. Supp. 298, 301 (N.D. Ohio 1972);
- Holt v. Shelton, 341 F. Supp. 821, 823 (M.D. Tenn. 1972).

Cases Concerning Discrimination

- Brenden v. Independent School District 742, 477 F.2d 1292, 1297-99 (8th Cir. 1973) (sex discrimination in high school interscholastic sports);
- Lee v. Macon County Board of Education, 283 F. Supp. 194, 197 (M.D. Ala. 1968) (3 Judge Ct.) (racial segregation and discrimination in high school athletics);
- Kelley v. Metropolitan County Board of Education, 492 F. Supp. 167, 196 (M.D. Tenn. 1980) (remedy for school segregation failed to address after-school extracurricular activities, an "essential component of an education").

Cases Concerning the Scope of Teachers' Duties

- McGrath v. Burkhard, 280 P.2d 864 (Cal. App. 1955) (school board had "right to assign [teacher] to assist in the supervision of any and all athletic or social activities, wherever held, when conducted under the name or auspices of the Sacramento Senior High School, or any class or organization thereof, provided such assignment is made impartially...");
- Board of Education of the City of Asbury Park Education Ass'n, 145 N.J. Super. 495, 505, 368 A.2d 396, 401-02 (N.J. Super. Ct. 1976) (enjoining teachers from refusing to perform extracurricular activities; "Realistically, the term extracurricular activity is a misnomer; it is not an 'extra' in the life of a student, nor has it traditionally been considered an 'extra' for teachers. Such activities are an essential part of a child's overall education. Learning and self-realization cannot take place in a vacuum; rather, they are fostered in an atmosphere of social interaction and furthered by the development of a healthy group orientation");

- Parrish v. Moss, 106 N.Y.S. 2d 577 (N.Y. Sup. Ct. 1951) (discussed and quoted above).

Cases Concerning the Scope of School Board Authority to Expend Funds

- Alexander v. Phillips, 254 P. 1056, 1059 (Ariz. 1927) (expenditures for facilities for interscholastic athletics);
- McNair v. School District No. 1, 288 P. 188 (Mont. 1930) (school district had authority to sell bonds to equip an outdoor gymnasium and athletic field in connection with a high school; "Education may be particularly directed to either mental, moral or physical powers or faculties, but in its broadest and best sense it embraces them all.");
- Kay County Excise Board v. Atchison, T. & S.F. Ry. Co., 91 P.2d 1087, 1088-89 (Okla. 1939) (expenditures for band uniforms).

Cases Concerning the Scope of Tort Liability and Insurance Coverage

- Feaster v. Old Security Life Insurance Co., 209 A.2d 354, 357 (1965), *aff'd*, 219 A.2d 340 (1966) ("...[S]chool-sponsored activities, such as sports, drama, and the like, generally take place outside of class hours, commonly after the end of regular classes. Such activities are generally denominated 'extra-curricular,' but they nevertheless form an integral and vital part of the educational program. Participation in such activities including student attendance at athletic contests is actively encouraged....");
- Boulet v. Brunswick Corporation, 336 N.W.2d 904, 907 (Mich. App. 1983).

Holdings that the property interest in education recognized in Goss v. Lopez cannot be broken down into separate components present a second major problem. Dallam v. Cumberland Valley School District, *supra*, 391 F. Supp. 358, 361 (M.D. Pa. 1975), is typical of these cases. There, in an athletic eligibility case involving student transfers, the court stated:

It is significant that in the context of finding a property interest in education the majority in Goss spoke in terms of a 'total exclusion from the educational process.' 419 U.S. at 576, 95 S.Ct. at 737. It seems to us that the property interest in education created by the state is participation in the entire process. The myriad activities which combine to form that educational process cannot be dissected to create hundreds of separate property rights, each cognizable under the Constitution.

See also Albach v. Odle, *supra*, 531 F.2d at 985.

This appears to be a serious misreading of Goss. The Court in Goss did not establish the standard for invoking due process as total exclusion from the educational process. The words "total exclusion" described the fact situation in Goss. Utilizing them to establish the outer limits of Goss would produce

anomalous results. A one-day suspension from school would be subject to procedural protection; a full year exclusion from one class, or from all extracurricular activities would not, despite a greater negative impact on educational opportunity. See Cole v. Newton Special Municipal Separate School District, 676 F. Supp. 749, 751-52 (S.D. Miss. 1987) [in-school suspension might involve "sufficient educational deprivation to warrant its being treated as the equivalent of a suspension" (emphasis added)]. If courts insist upon using the Dallam standard, it is difficult to see how suspension for one day is any more a total exclusion from the educational process than a year-long exclusion from a portion of the educational program. See Goss, 419 U.S. at 597, 95 S.Ct. at 747-48 (Powell, J., dissenting).

(b.) Failure to Apply the Basic Principles Concerning Identification of Protected Property Interests

The Supreme Court's initial reference to "protected [property] interests" occurred in the 1972 decisions in Board of Regents v. Roth, 408 U.S. 564, 569, 92 S. Ct. 2701, 2705, and Perry v. Sinderman, 408 U.S. 593, 599, 601, 92 S. Ct. 2694, 2698, 2699. The Roth Court explained that federal due process protections attach when a person has, based upon "an independent source such as state law," "a legitimate claim of entitlement" "[to] a benefit" rather than "an abstract need or desire for it" or "a unilateral expectation of it." Roth, 408 U.S. at 577, 92 S. Ct. at 2709. A statute, the terms of an appointment to a position, a rule, a policy [*id.*, 408 U.S. at 577-78, 92 S. Ct. at 2709-10] and agreements implied from words and conduct in a particular setting [Perry, 408 U.S. at 601-62, 92 S. Ct. at 2699-2700] give rise to protected property interests. While Roth and Perry addressed property interests of persons already employed, the Court's favorable discussion of Goldsmith v. United States Board of Tax Appeals, 270 U.S. 117, 46 S. Ct. 215 (1926) in Roth, 408 U.S. at 576, n.15, 92 S. Ct. 2708-10, n.15, demonstrates that an applicant, satisfying written or other criteria for a benefit, also has a protected interest.

Courts in Davis v. Central Dauphin School District School Board, *supra*, 466 F. Supp. at 1263 and Duffley v. N.H. Interscholastic Athletic Association, *supra*, 446 A.2d at 467, applied correct principles, finding protected interests, respectively, by reference to the school district's "athletic policies" (466 F. Supp. at 1263) and state regulations and an athletic association handbook. 446 A.2d 467. See also Brands v. Sheldon Community School, *supra*, 671 F. Supp. at 631; Palmer v. Merluzzi, *supra*, 868 F.2d at 97 (dissenting opinion). However, in many discipline cases, courts rejected student claims in a conclusory manner, without canvassing the possible sources of a protected interest in the extracurricular activity at issue in the particular locality. Just as one education employer (but not another) might create property interests by a formal tenure system, local school system and state policies can differ with respect to extracurricular activities. See Poling v. Murphy, *supra*, 872 F.2d at 764; Haverkamp v. Unified School District No. 380, *supra*, 689 F. Supp. at 1058; Davis v. Churchill County Board of Trustees, *supra*, 616 F. Supp. at 1314 n.3; Bernstein v. Menard, *supra*, 557 F. Supp. at 91; Makanui v. Department of Education, *supra*, 721 P.2d at 170.

(c.) Reliance on Athletic Eligibility Cases in Resolving Discipline Cases

It is common for courts in discipline cases to support a conclusion that a student has no protected interest in an extracurricular activity by brief citation to athletic eligibility precedent. *E.g.*, Makanui, *supra*, 721 P.2d at 170; Poling v. Murphy, *supra*, 872 F.2d at 764. This approach is problematic. First, protected interests are determined by statutes, rules, customary conduct, etc. in the particular setting. *E.g.*, Perry v. Sinderman, *supra*, 408 U.S. at 599-603, 92 S. Ct. at 2698-2700. Differences from place-to-place are to be expected. Second, in the case of many high school activities, written or implied rules provide for all to participate "except 'for cause,'" "[t]he hallmark of property" (Logan v. Zimmerman Brush Co., 455 U.S. 422, 430, 102 S. Ct. 1148, 1155 (1982)) for these purposes. In contrast, athletic eligibility rules often exclude some persons. *E.g.*, Walsh v. Louisiana High School Athletic Association, 616 F.2d 152, 155 n.2 (5th Cir. 1980) (durational residence rule for participation in athletic contests after high school transfer). In brief, non-comparable situations are treated as the same. [Of course, any classifications created by eligibility rules can be challenged on equal protection and other grounds. See summaries of ABC League and Chabert decisions at section F.2.(c.) of this chapter, *supra*. In addition, some persons seeking to participate will, plausibly, contend that they satisfy all criteria, and should be held to have protected interests. See, Duffley, *supra*, 446 A.2d at 467 and Goldsmith, *supra*, 270 U.S. at 117, 123, 46 S. Ct. at 215, 217 (eligibility "shown by [the] application")].

4. Liberty Interests

Liberty interests (see Chapter I.B.2.) may also be implicated in extracurricular participation, depending upon the particular activity:

- freedom of association (see "Substantive Rights," §I.B.6, "Association -- Student Organizations" in Center's 1982 manual *School Discipline and Student Rights*);
- imposition of a stigma or other disability which forecloses future employment opportunities (this is a *liberty* interest distinct from the property interest above); Warren v. National Association of Secondary School Principals, *supra*, 375 F. Supp. at 1048 (potential impact of exclusion from National Honor Society on future employment);
- damage to one's good name, reputation, honor or integrity as a result of the exclusion; Warren, *supra*, 375 F. Supp. at 1048;
- "...the right of the individual...to acquire useful knowledge..."; Board of Regents v. Roth, *supra*, 408 U.S. at 572, 92 S. Ct. at 2707, quoting Meyer v. Nebraska, 262 U.S. 390, 399, 43 S. Ct. 625, 626 (1923); See Boyd v. Board of Directors, *supra*, 612 F. Supp. at 93 (impact of dismissal from football team on "a college scholarship and...a college education"); Warren, *supra*,

375 F. Supp. at 1048 (impact of dismissal from National Honor Society on future educational opportunities).

Evidence must establish that injury to future opportunities is likely; "assumption" will not suffice. Board of Regents v. Roth, *supra*, 408 U.S. at 574 n.13, 92 S. Ct. 2707-08 n.13; Harris v. Blake, *supra*, 798 F.2d at 422-23, n.2. For doctrinal developments concerning the liberty interest in reputation, see Chapter I.B.3., *supra*.

From the perspective of liberty interests, the athletic eligibility cases may also be distinguished. First, since they all involve rules concerning residency, transfers, off-season play, and the like, they are much less likely to involve the same damage to reputation as an exclusion for misbehavior. Second, the strength of the claims concerning freedom of association are probably weaker concerning interscholastic athletic participation than for many other student organizations.

In Ector County Independent School District, *supra*, 518 S.W.2d 576 (Tex. Ct. Civ. App. 1974), the court stated that the exclusion from honorary societies deserved more due process protection than a short suspension, in light of the damage to reputation:

We conclude that the one-day suspension required no more than the oral notice from the Assistant Principal concerning his determination at an informal hearing that she had in fact violated school rules. We perceive the permanent expulsion from the two school organizations [the National Honor Society and a local student group organized to foster school spirit], in which membership apparently resulted from several years of diligent efforts upon the part of Karen, both in and out of the classroom, to be *of a more serious nature* in which due process was initially denied.

Id., at 582 (emphasis added). The court also noted that even where there is no factual dispute as to the misconduct, due process may be necessary so that the student may be heard on the issue of what discipline is appropriate. *Id.* at 581. As indicated by both Ector County and Warren v. National Association of Secondary School Principals, *supra*, 375 F. Supp. at 1047, the nature of the hearing required varies with the situation; exclusion from one event may call for different procedures than lengthier restrictions.

For substantive challenges to extracurricular exclusion, see §VIII.F. in the substantive rights portion of the Center's 1982 manual *School Discipline and Student Rights*.

5. The Impact of Changing Concepts of State Action

Supreme Court decisions have in recent years constricted principles of "state action." *E.g.*, McCormack v. National Collegiate Athletic Association, 845 F.2d 1338, 1345-46 (5th Cir. 1988) (rejecting Circuit's earlier view that conduct of NCAA was "state action" as "later Supreme Court decisions have more narrowly defined [that] concept..."). As a result, recent constitutional challenges to N.C.A.A. actions have failed. *Id.* at n.42; N.C.A.A. v. Tarkanian, 109 S.Ct. 454, 467 n.2 (1988) (citing Court of Appeals' more recent decisions). The "common law of associations," or related concepts, may provide a basis for challenging some N.C.A.A. actions. See the Center's 1982 manual *School Discipline and Student Rights* at pages 527-28 and West key number outline, "Associations."

G. EXCLUSION FROM GRADUATION CEREMONIES

The student's right to notice and hearing prior to exclusion from graduation ceremonies depends upon a showing that one or more of the property or liberty interests discussed in Chapter I.B. is at stake and that the infringement upon the interest is not so trivial as to be *de minimis*. The extent of notice and hearing required under the due process clause will depend upon the factors discussed in Chapter I.C.

The issue here is not whether the student has a protected interest in his or her diploma, but whether he or she has a protected interest in participating in the ceremony itself. (Concerning the former, see Chapter II.H., "Procedural Rights for Grading, Diploma Denial, and Other 'Academic' Decisions.")

In such a case, one should argue that, through its policies and practices, the local school system has established an objective expectation that students meeting the requirements for graduation will be allowed to participate in the ceremony and that this entitlement is more than trivial. It may be helpful to compare the importance of the ceremony with the importance of one day of school, which under Goss v. Lopez, 419 U.S. 565, 95 S.Ct. 729 (1975), is more than *de minimis*.

See:

- Clark v. Board of Education, 51 Ohio Misc. 71, 367 N.E.2d 69, 74 (Ohio Ct. Common Pleas 1977) (Fourteenth Amendment, including equal protection and personal privileges, protects rights of senior activities, including graduation ceremonies);

- Castillo v. South Conejos School District, RE-10, C.A. No. 79-CV-16 (Colo. Dist. Ct., Conejos County, Apr. 18, 1979) (Clearinghouse No. 26,824A) (same).

But see:

- Swany v. San Ramon Valley Unified School District, 720 F. Supp. 764, 773-76 (N.D. Ca. 1989) (no protected property right to participate in graduation ceremony; delay in providing student diploma and his preclusion from the commencement exercise did not, in fact, deprive him of "his good name, reputation, or honor or any future opportunities"; alternatively, procedures employed were adequate);
- Fowler v. Williamson, 448 F. Supp. 497, 502 (W.D.N.C. 1978) (no liberty or property interests in participation in graduation ceremonies, although court recognizes property interest in the diploma itself);
- Mifflin County School District v. Stewart, 94 Pa. Commw. 313, 503 A.2d 1012, 1013 (Pa. Commw. Ct. 1986) (commencement ceremony is symbolic, not a component of the educational process; exclusion from the ceremony implicates no property interest).

§VIII.G. of the substantive rights portion of the Center's 1982 manual *School Discipline and Student Rights* provides cases and comments on substantive challenges to exclusion from graduation ceremonies.

H. PROCEDURAL RIGHTS FOR GRADING, DIPLOMA DENIAL, AND OTHER "ACADEMIC" DECISIONS

In Board of Curators of University of Missouri v. Horowitz, 435 U.S. 78, 98 S.Ct. 948 (1978), a student alleged a denial of due process in her dismissal from medical school. She did not allege deprivation of a property interest. The Supreme Court held that it did not need to decide on her claim of a liberty interest (based on foreclosed opportunities to continue in medicine) since:

Assuming the existence of a liberty or property interest, respondent has been awarded at least as much due process as the Fourteenth Amendment requires. The School fully informed respondent of the faculty's dissatisfaction with her clinical progress and the danger that this posed to timely graduation and continued enrollment. The ultimate decision to dismiss respondent was careful and deliberate. These procedures were sufficient under the Due Process Clause of the Fourteenth Amendment. We agree with the District Court that respondent

'was afforded full procedural due process by the [school]. In fact, the court is of the opinion, and so finds, that the school went beyond [constitutionally required] procedural due process by affording [respondent] the opportunity to be examined by seven independent physicians in order to be absolutely certain that their grading of the [respondent] in her medical skills was correct.'

Id. at 84-85, 98 S.Ct. at 952. The Court further stated that notice and hearing requirements for disciplinary actions are generally not required in dismissals "for pure academic reasons" because an academic judgment "is by its nature more subjective and evaluative than the typical factual questions presented in the average disciplinary decision" and because courts are generally ill-equipped to review academic judgments. *Id.* at 91 and n.6, 98 S.Ct. at 955 and n.6.

In Regents of University of Michigan v. Ewing, 474 U.S. 214, 106 S.Ct. 507 (1985), the Supreme Court considered a substantive due process challenge to a student's academic dismissal from a combined undergraduate-medical school degree program. The Court "accept[ed] the University's invitation to 'assume the existence of a constitutionally protectible property right in [Ewing's] continued enrollment'...." *Id.*, at 223, 106 S.Ct. at 512. Section VIII.C.4. of the Center's 1982 manual *School Discipline and Student Rights* addresses substantive due process challenges to academic decisions.

Many post-Horowitz decisions have held that particular procedures used in making academic decisions were sufficient to meet whatever due process requirements may be applicable.

See:

- Clements v. County of Nassau, 835 F.2d 1000, 1006 (2d Cir. 1987) (grading and evaluation of clinical performance in nursing program; "four-step grievance procedure");
- Hankins v. Temple University, 829 F.2d 437, 443-45 (3d Cir. 1987) (dismissal of physician from fellowship program for deficiencies in clinical skills and judgment, absenteeism, and abandoning patients; "... [Plaintiff] met with faculty members on numerous occasions to discuss her performance and termination. Additionally, she was provided with at least two written evaluations of her performance, both of which indicate that her deficiencies had been discussed at length in prior meetings. Moreover, Dr. Meyers held a lengthy discussion with Dr. Hankins after her initial suspension, during which she was given ample time to defend herself.");
- Mauriello v. University of Medicine & Dentistry of New Jersey, 781 F.2d 46, 52 (3d Cir. 1986) (academic dismissal from doctoral program in microbiology; "Here, plaintiff was informed of her academic deficiencies, was given an opportunity to rectify them during a probationary period before being dismissed, and was allowed to present her grievance to the graduate committee...");
- Henson v. Honor Committee of U. VA., 719 F.2d 69, 72 (4th Cir. 1983) (exclusion from law school for failing grades);
- Ikepeazu v. University of Nebraska, 775 F.2d 250, 254 (8th Cir. 1985) (dismissal from doctoral program in pharmacy for failing grades);
- Miller v. Hamline University School of Law, 601 F.2d 970, 972 (8th Cir. 1979) (expulsion for failing grades; "In the instant case, plaintiff was informed of his grade deficiency and impending dismissal, his dismissal was for academic failure, he was allowed to present and support in writing his request for readmission, and he was given the opportunity to privately contact the Admissions Committee members...");
- Harris v. Blake, 798 F.2d 419, 423-24 (10th Cir. 1986) (academic evaluation and grades);
- Haberle v. University of Alabama, 803 F.2d 1536, 1539 (11th Cir. 1986) (academic dismissal from Ph.D. program in chemistry for failing qualifying examination);
- Watson v. University of South Alabama College of Medicine, 463 F. Supp. 720 (S.D. Ala. 1979) (academic dismissal);
- Valadez v. Graham, 474 F. Supp. 149, 157-59 (M.D. Fla. 1979) (assigning credit for previous work to high school transfer students);
- Mohammed v. Mathog, 635 F. Supp. 748, 751-52 (E.D. Mich. 1986) (academic dismissal from residency, medical program);
- Davis v. Mann, 721 F. Supp. 796, 799 (S.D. Miss. 1988) (academic dismissal from dental school residency program, including educational

program; "the procedural safeguards provided to Davis far exceeded those imposed by the Fourteenth Amendment for an academic dismissal.");

- Bergstrom v. Buettner, 697 F. Supp. 1098, 1100-01 (D.N.D. 1987) ("...plaintiff received numerous hearings regarding her grades and her ultimate dismissal [from medical school program]");
- Bleicker v. Board of Trustees, 485 F. Supp. 1381, 1386-87 (S.D. Ohio 1980) (dismissal from school of veterinary medicine due to grades);
- Amelunxen v. University of Puerto Rico, 637 F. Supp. 426, 430-31 (D.P.R. 1986) (failing grade on oral thesis examination and resultant academic dismissal);
- Hubbard v. John Tyler Community College, 455 F. Supp. 753, 755 (E.D. Va. 1978) (academic dismissal due to grades);
- Sanders v. AJIR, 555 F. Supp. 240, 247-48 (W.D. Wisc. 1983) (expulsion from medical school; "...whether the expulsion be characterized as disciplinary or academic, plaintiff received the full protection of the Due Process Clause...");
- Neel v. Indiana University Board of Trustees, 435 N.E.2d 607, 613 (Ind. Ct. App. 1982) (academic dismissal from dental program; problems included absences);
- North v. State of Iowa, 400 N.W.2d 566, 570 (Iowa 1987) (denial of readmission to medical school; "...she was given a chance to meet with the several committees who would make the determination that she should continue, and she was able to have representatives appear on her behalf. She was always given notice and an opportunity to be heard. The faculty committees which ultimately made the decisions on every student's ability to proceed with his or her medical education made a fair, reasonable, and meaningful determination of Dr. North's ability to continue with her medical education, based on all the information before them...").

Compare:

- Debra P. v. Turlington, *infra*, 474 F. Supp. 244, 265-67 (M.D. Fla. 1979), *aff'd in relevant part*, 644 F.2d 397, 403-06 (5th Cir. 1981).

While purely academic decisions do not require the notice and hearings employed in disciplinary proceedings, lower court decisions and standard due process analysis nevertheless make it reasonably clear that many purely academic decisions do involve significant due process interests which must be protected by other appropriate procedures. First, the student's property entitlement to education is as affected by an academic dismissal (or diploma denial) as by a disciplinary dismissal. Many lower courts have found property interests; nothing in Horowitz undermines these holdings.

See:

- Debra P. v. Turlington, 474 F. Supp. 244, 265-67 (M.D. Fla. 1979), aff'd in relevant part, 644 F.2d 397, 403-06 (5th Cir. 1981) (denial of high school diploma because of failure on 'functional literacy test', which was instituted only after students had reached high school level, implicated students' "property right in graduation with a standard diploma if they have fulfilled the present requirements for graduation exclusive of the [test]" as well as their "liberty interest in being free of the adverse stigma associated with the certificate of completion" (given to students who have completed all courses but did not pass the test); the implementation schedule for the test denied due process because it provided inadequate notice, particularly since the skills which were measured should have been taught in the early grades; Horowitz distinguished in light of the extended notice and review procedures used in the latter case, as well as the differences between graduate education and secondary education; the appeals court's formulation was that the state's establishment of free, compulsory education created a mutual expectation, rising to the level of a property interest, that a student who attends and passes the required courses will receive a diploma; appeals court remanded because it also found a fundamental unfairness in the test's covering matters that may not have been taught);
- Navato v. Sletten, 560 F.2d 340, 344 (8th Cir. 1977) (termination from residency program in psychiatry for a mixture of academic and disciplinary factors; contract gave rise to property interest);
- Harris v. Blake, 798 F.2d 419, 422 (10th Cir. 1986), *cert. den.*, 107 S.Ct. 882 (1987) (payment of tuition gives rise to property interest in college attendance);
- Ross v. Pennsylvania State University, 445 F. Supp. 147, 152 (M.D. Pa. 1978) ("A student has a reasonable expectation based on statements of policy by Penn State and the experience of former students that if he performs the required work in a satisfactory manner and pays his fees he will receive the degree he seeks. Pursuant to state law, Ross as a graduate student had a property interest in the continuation of his course of study");
- Campbell v. Board of Education, 475 A.2d 289, 297 (Conn. 1984) (denial of course credit and grade reductions for nonattendance; some form of due process safeguards applies).

Cf:

- Horowitz, *supra*, 435 U.S. at 86 n.3, 98 S.Ct. at 953 n.3 ("We fully recognize that the deprivation to which respondent was subjected -- dismissal from a graduate medical school -- was more severe than the 10-day suspension to which the high school students were subject in Goss").

But see:

- Arundar v. DeKalb County School District, 620 F.2d 493, 494 (5th Cir. 1980) (plaintiff's complaint failed to allege "any 'independent source, such as state statutes or [other] rules' entitling plaintiff to the particular course of study which she claims has been denied her");

- Slocum v. Holton Board of Education, 429 N.W.2d 607, 611-12 (Mich. Ct. App. 1988) (grade reduction for nonattendance; no liberty or property interest);
- New Braunfels Independent School District v. Armke, 658 S.W.2d 330, 332 (Tex. Ct. App. 1983) (receipt of zeroes for classwork and lowering of grades for quarter for misconduct; no adverse impact on property right to an education).

See the cases in the Center's 1982 manual *School Discipline and Student Rights* in the section on "Substantive Rights," §VIII.C.4, "Purely Academic Decisions". The many academic dismissal cases, which by stating that courts may intervene where the dismissal is arbitrary and capricious, are implicitly declaring that due process interests are at stake, since the federal courts would have no jurisdiction under a substantive due process "arbitrary and capricious" standard in the absence of protected interests.

See Chapter I.A.-B. for analysis of relevant property and liberty interests.

Further, the Court in Horowitz distinguished Greenhill v. Bailey, 519 F.2d 5 (8th Cir. 1975), where the court of appeals held that a student who was dismissed from medical school was entitled to a hearing because, even though the dismissal was solely for academic reasons, the need for greater procedural protections was invoked by the school's dispatch of a letter to a medical college association suggesting the student's deficiency in intellectual ability. 435 U.S. at 88 n.5, 98 S.Ct. at 954 n.5.

In any event, the limits placed on procedural protection for purely academic decisions do not apply when academic credit is being denied for what are really disciplinary reasons. (See the cases cited at §VIII.C.4., "Purely Academic Decisions -- The 'Academic'/'Disciplinary' Distinction," in the Center's 1982 manual *School Discipline and Student Rights*.)

See:

- Crook v. Baker, 813 F.2d 88, 97 (6th Cir. 1987) (defendants acknowledged that revocation of degree for fraud had elements of academic decision and elements of disciplinary decision; due process afforded);
- Hall v. Medical College of Ohio at Toledo, 742 F.2d 299, 308, 309-10 (6th Cir. 1984) (cheating is disciplinary; due process protections afforded);
- Jaksa v. Regents of the University of Michigan, 597 F. Supp. 1245, 1248 n.2 (E.D. Mich. 1984), *aff'd*, 787 F.2d 590 (6th Cir. 1986) (suspension for cheating was disciplinary matter, not academic matter; due process afforded);
- Lightsey v. King, 567 F. Supp. 645, 648-649 (E.D.N.Y. 1983) (cheating is disciplinary not academic; ignoring result of hearing process denied due process rights);

- Bleicker v. Board of Trustees, *supra*, 485 F. Supp. at 1387-88 (S.D. Ohio 1980) (suspension from school of veterinary medicine for cheating was disciplinary; due process requirements satisfied);
- Barletta v. State University Medical Center, 533 So. 2d 1037, 1040 (La. Ct. App. 1988) (expulsion from dental school for conduct "contrary to the best interests" of school, based upon student's violation of state law against dental hygienist's performing unauthorized operations; student "accorded every possible benefit of due process");
- Mary M. V. Clark, 100 A.D.2d 41, 473 N.Y.S.2d 843, 845 (N.Y. App. Div. 1984) (cheating on examination; "discipline" case; due process afforded);
- North v. West Virginia Board of Regents, 233 S.E.2d 411 (W. Va. 1977) (expulsion from medical school and loss of all credits for falsifying initial application implicated protected interests); North, 332 S.E.2d 141, 145-46 (W. Va. 1985) (due process afforded).

Compare:

- Nash v. Auburn University, 812 F.2d 655, 663, 667 (11th Cir. 1987) (suspension for academic dishonesty by "academic disciplinary process"; due process afforded);

Aside from more subtle forms of reducing grades for student's nonacademic conduct (see §VIII.C.3. of the Center's 1982 manual *School Discipline and Student Rights*), the most common practice in this area is the reduction of grades or credits for absences or tardiness (see §VIII.C.1 of the 1982 volume.) As the latter section explains, this practice is arguably "disciplinary" and is subject to a number of substantive challenges. Similarly, it should call for procedural protection appropriate to the nature of the case. (See Chapter I.C., "What Kind of Due Process.") Moreover, where a short suspension results in additional punishment -- through grade reductions for "unexcused" absence during the suspension days or through denial of the right to make up tests missed -- the student is arguably entitled to a considerably more formal hearing than applies to the normal short suspension. (See Chapter I.C.4.(a.), and §VIII.C.1. of the Center's 1982 manual *School Discipline and Student Rights*.) Jones v. Latexo Independent School District, 499 F. Supp. 223, 239 n.15 (E.D. Tex. 1980). See Shanley v. Northeast Independent School District, 462 F.2d 960, 967 n.4 (5th Cir. 1972).

However, a number of courts have rejected these arguments.

See:

- Harris v. Blake, 798 F.2d 419, 423 (10th Cir. 1986) (where graduate level class involved "actual participation and observation" attendance was an academic requirement);
- Campbell v. Board of Education of New Milford, 475 A.2d 289, 293, 297 (Conn. 1984) (court acts upon plaintiff's concession that "school boards may properly require classroom teachers to take classroom participation into

account in assigning numerical grades"; while some form of procedural protection should accompany denial of credit and grade reduction, facts here did not show impairment of plaintiff's rights);

- Slocum v. Holton Board of Education, 429 N.W.2d 607, 611-12 (Mich. Ct. App. 1988) (grade reduction for nonattendance; no liberty or property interest);
- New Braunfels Ind. Sch. Dist. v. Armke, 658 S.W.2d 330, 332 (Tex. Ct. App. 1983) ("...reduction of Appellees' six-week grades by three points for each day of suspension has no adverse impact on Appellee's property rights to a public education.").

I. CORPORAL PUNISHMENT

The Supreme Court has held that corporal punishment impacts students' liberty interests. The Court also declared that the procedures required by the due process clause generally do not include notice and hearing. Ingraham v. Wright, 430 U.S. 651, 97 S.Ct. 1401 (1977). The Court recognized that the due process clause protects the liberty interest in freedom from physical restraint and from infliction of physical pain. *Id.* at 673-74, 1413-14. The Court ruled, however, that sufficient procedural protection is provided by students' right to sue for damages and/or press criminal charges for assault and battery in state court if the punishment is excessive under state law. *Id.*, at 676-80, 1415-17.

The Court's reasoning in Ingraham has been criticized.

See, e.g.:

Thomas J. Flygare, "Ingraham v. Wright: The Return of Old Jack Seaver," 23 *Inequality in Education* 29 (September 1978);

Patricia M. Lines, "Corporal Punishment After Ingraham: Looking to State Law," 23 *Inequality in Education* 37 (September 1978).

A number of courts have followed Ingraham, ruling that in particular states the existence of adequate state remedies satisfied procedural due process requirements. In cases arising in New Mexico, contradictory rulings have been made regarding the availability of state remedies.

See:

- Metzger v. Osbeck, 841 F.2d 518, 521 n.3 (3d Cir. 1988) (Pennsylvania);
- Hall v. Tawney, 621 F.2d 607, 609-10 n.2 (4th Cir. 1980) (West Virginia);
- Woodard v. Los Fresnos Independent School District, 732 F.2d 1243, 1245 (5th Cir. 1984) (Texas);
- Coleman v. Franklin Parish School Board, 702 F.2d 74, 76 (5th Cir. 1983) (Louisiana);
- Garcia v. Miera, 817 F.2d 650, 656 (10th Cir. 1987) (even if procedural due process is satisfied by the existence of "adequate state remedies," "grossly excessive [corporal punishment]...shocking to the conscience violate[s] substantive due process rights, without regard to the adequacy of state remedies") (New Mexico); compare McGinnis v. Cochran, C.A. No. 85-261-M (D.N.M. June 3, 1985) (Mem. Opin. and order, pp. 6-7) (Clearinghouse No. 45,541) (refusing to dismiss complaint alleging "psychological abuse" of special education student by teacher and procedural and substantive due process claims; "It appears that New Mexico does not provide any tort

remedy against public school teachers who inflict excessive corporal punishment on their students");

- Hale v. Pringle, 562 F. Supp. 598 (M.D. Ala. 1983);
- Cole v. Greenfield-Central Community Schools, 657 F. Supp. 56, 59-60 (S.D. Ind. 1986);
- Rhodus v. Dumiller, 552 F. Supp. 425, 428 (M.D. La. 1982) ("[T]he Fourteenth Amendment's requirement of procedural and substantive due process is satisfied by Louisiana's preservation of commonlaw constraints and remedies");
- Paul v. McGhee, 577 F. Supp. 460 (N.D. Tenn. 1983).

It has been held that violation of a school district's rules for administering corporal punishment is not, *per se*, a due process violation. It is not always clear whether courts allude to procedural or substantive due process considerations.

See:

- Woodard v. Los Fresnos Independent School District, *supra*, 732 F.2d at 1245;
- Coleman v. Franklin Parish School Board, *supra*, 702 F.2d at 76;
- Hale v. Pringle, *supra*, 562 F. Supp. at 601;
- Rhodus v. Dumiller, *supra*, 552 F. Supp. at 428.

Procedural due process claims, encompassing notice and hearing requirements, may be possible under state law. In Smith v. W. Va. State Board of Education, 295 S.E.2d 680 (W. Va. 1982), the court held, based upon the state constitution, that "a liberty interest is implicated" by "manual corporal punishment of school children." *Id.* at 687-88. The court continued:

"We conclude that the following minimal due process procedures should be utilized. First, the student should be given an opportunity to explain his version of the disruptive event as such an explanation may convince a fair minded person that corporal punishment is not warranted. Second, in the absence of some extraordinary factor the administration of corporal punishment should be done in the presence of another adult. This latter requirement is designed to protect both the student and the person administering corporal punishment by providing a neutral observer." *Id.* at 688, footnote omitted.

The court directed the West Virginia Board of Education "to promulgate corporal punishment regulations not inconsistent with the standards set out [in its opinion]." *Id.* at 688. Thereafter, the state legislature incorporated the Smith due process standards in the West Virginia School Laws, §18A-5-1(3),(5). It added

provisions for notice to parents before and after administration of corporal punishment. W. Va. Sch. Laws, §18A-5-1 (7),(8).

For substantive challenges, see "Substantive Rights," §VIII.B., "Corporal Punishment and Similar Abuses" in the Center's 1982 manual *School Discipline and Student Rights*.

J. EXCLUSION FROM SCHOOL BUS

Students facing exclusion from the school bus for disciplinary reasons may be entitled to appropriate due process procedures under either of two theories. First, if the student effectively has no other means of reaching school, the exclusion deprives him or her of the property interest in attending school as much as a full suspension or expulsion. This argument was adopted by the district court in Shaffer v. Board of School Directors, 522 F. Supp 1138, 1142 (W.D. Pa. 1981), a case brought by indigent parents of kindergarten students adversely impacted by the cessation of mid-day transportation for kindergarten. On appeal, however, the court of appeals rejected plaintiffs' equal protection and *substantive* due process claims, although it did not challenge the exclusionary impact of the transportation. 687 F.2d 718 (3d Cir. 1982), *cert. denied*, 459 U.S. 1212, 103 S. Ct. 1209 (1983).

Litigants in federal court will have to prove exclusion *in fact* to invoke such a procedural due process claim. See Kadrmias v. Dickinson Public Schools, 108 S. Ct. 2481, 2487 (1988) (rejecting equal protection challenge to fee for school bus transportation); Rose v. Nashua Board of Education, 679 F.2d 279, 282 (1st Cir. 1982) (uncontradicted assertion that system which had halted transportation for disciplinary reasons provided alternative transportation for student who could not get to school). In two cases decided by state courts on substantive grounds, evidence revealed that lack of transportation precluded school attendance. Manjares v. Newton, 411 P.2d 901, 904, 907 (Cal. 1966) (refusal to provide transportation "arbitrary and unreasonable"); Potter v. Miller, 287 S.E.2d 163, 164 (W. Va. 1982) (equal protection and statutory violations).

Second, state statutes which mandate the provision of bus transportation for students who live beyond a certain distance may create a separate property interest in the bus transportation itself. However, in Rose v. Nashua Board of Education, *supra*, 679 F.2d at 282, a case involving suspension of bus transportation for up to five days for disciplinary reasons, the court held that "[t]here ... could be no reasonable expectation, derived from the [New Hampshire] statute, or continuous service without suspension," and that the deprivation -- "only inconvenience, not loss of educational opportunity or other significant injury" -- was *de minimis*. Alternatively, the court held that a post-suspension hearing satisfied any due process requirement. *Id.* [The district court had held that

plaintiffs had a protected property interest. Rose, 506 F. Supp. 1366, 1370 (D.N.H. 1981)].

For substantive challenges to the appropriateness of the penalty, see §VIII.L. in the Center's 1982 manual *School Discipline and Student Rights*.

CHAPTER III

SPECIFIC ELEMENTS OF DUE PROCESS

The sections below discuss particular procedural safeguards which have been held to be required by due process in various disciplinary contexts. It is important to read these sections in conjunction with Chapter II on the specific kind of discipline at issue, and the more general principles in Chapter I.C. for determining what process is due.

Note on Case Citations and Form of Discipline

As Chapter I.C.4.(a.) indicates, an important factor in determining "what kind of due process" is the severity of the deprivation. For exclusions, this includes the length of the exclusion. Each case cited in this chapter includes a notation as to the kind of discipline, including its length where appropriate, to which the court applied the specific procedural requirement. The extent to which these procedures are applicable to short-term exclusions is addressed within each section and in Chapter II.A., "Suspension for Ten Days or Less."

Individual Harm, General Review

Courts sometimes emphasize the general rule that the constitutional adequacy of due process must be judged in light of the particular circumstances, including the kinds of procedures needed to minimize mistakes. See Chapter I.C.4.(b.). Therefore, in order to avoid a finding that any error was harmless, an advocate must demonstrate with particularity that the particular student's interests in a fair and accurate determination were hampered by the absence of the procedures at issue.

On the other hand, when a school's due process procedures are under review in a more general context (e.g., in a class action suit or in a legal and policy review outside the context of litigation), the focus is more properly whether the school's uniform procedures for certain kinds of discipline are or will be adequate for the full range of circumstances and cases arising under those procedures. Even in these situations, however, concrete evidence of problems will be helpful.

State Law

Many states have enacted statutes which set out disciplinary procedures. These sometimes provide legally binding procedural rights, granting greater protection than the constitutional minimums discussed below. On the other hand, students cannot be deprived of rights accorded under the federal constitution if the state statutes fail to meet these minimums.

Local Rules

Similarly, locally enacted rules may provide procedural rights which go beyond the federal constitutional minimums. See, e.g., Hillman v. Elliot, 436 F. Supp. 812, 817 (W.D. Va. 1977) ("rights [under district discipline code] are broader than due process requires according to Goss"). These rules may also be legally binding. See the Center's 1982 manual *School Discipline and Student Rights*, §V.E., "School's Failure to Follow Its Own Rules" and, for example, James v. Wall, 783 S.W. 2d 615 (Tex. App. 1989) (exclusion from medical school for cheating; "There is evidence that the Rules were improperly applied, or that discipline was administered by measures outside the Rules.").

A. PRIOR HEARINGS AND THE EMERGENCY EXCEPTION

1. Overview

Normally, notice and hearing must be provided *before* the student is suspended, expelled, or otherwise excluded. An exception is permitted where there is a genuine emergency in which the student's continued presence poses an *on-going* physical danger or an *on-going* threat of disruption of the academic process. In such emergencies, notice and hearing must follow as soon as practicable, and in no event later than three days after the exclusion begins. The fact that there is justification for removing the student from the school does not by itself dispense with the requirement of prior notice and hearing, unless the threat also makes it impossible to provide such notice and hearing. Where full hearings are impossible and must be delayed, less extensive interim hearings must be provided before the exclusion if possible, or as soon as possible thereafter if not. In order to avoid abuse, the emergency exception should be read very narrowly.

2. General Right to Prior Hearing

[I]t is fundamental that except in emergency situations ... due process requires that when a State seeks to terminate [a protected] interest ..., it must afford 'notice and opportunity for hearing appropriate to the nature of the case' *before* the termination becomes effective.

Bell v. Burson, 402 U.S. 535, 542, 91 S.Ct. 1586, 1591 (1971) (emphasis in original; footnote omitted), *quoting Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S.Ct. 652, 657 (1950).

Accord:

- Cleveland Board of Education v. Loudermill, 470 U.S. 532, 542-45, 105 S.Ct. 1487, 1493-95 (1985) (termination of school security guard);
- Memphis Light, Gas & Water Division v. Craft, 436 U.S. 1, 16-19, 98 S.Ct. 1554, 1564-65 (1978) (termination of utility services);
- Smith v. Organization of Foster Families, 431 U.S. 816, 848, 97 S.Ct. 2094, 2111-12 (1977) (removal of foster children from foster families);
- Mathews v. Eldridge, 424 U.S. 319, 333, 96 S.Ct. 893, 902 (1976) (termination of Social Security disability payments);

- Goss v. Lopez, 419 U.S. 565, 579, 581-82, 95 S.Ct. 729, 738, 739-40 (1975) (school suspension);
- Wolff v. McDonnell, 418 U.S. 539, 557-58, 94 S.Ct. 2963, 2975 (1974) (revoking of prisoners' "good-time credits");
- Board of Regents v. Roth, 408 U.S. 564, 569-70, 92 S.Ct. 2701, 2705 (1972) (termination of university professor's employment);
- Boddie v. Connecticut, 401 U.S. 371, 378-79, 91 S.Ct. 780, 786 (1971) (access to courts for divorce proceedings).

See also:

- Jackson v. Franklin County School Board, 806 F.2d 623, 631 (5th Cir. 1986) ("...[Student's] due process rights...were violated by Franklin County School Officials' failure to provide notice and hearing concerning his continued exclusion from school.");
- Montoya v. Sanger Unified School District, 502 F. Supp. 209, 212-13 (E.D. Cal. 1980) (where students were first suspended for five days following informal hearings, subsequent extensions must be treated as separate, additional suspensions requiring separate hearings).

In Goss, *supra*, the Supreme Court applied the prior hearing rule to suspensions of ten days or less, requiring prior notice and hearing unless the student's "presence poses a *continuing* danger to persons or property or an *ongoing* threat of disrupting the academic process (emphasis added)." In such emergency conditions, the student "may be immediately removed from school," with notice and hearing to "follow as soon as practicable," and in no event later than three days after the suspension begins. *Id.* at 582-83, 95 S.Ct. at 740.

3. Decisions Stating General Standard or Finding No Emergency

The following decisions restated the Goss standard and/or found no basis for an emergency exclusion.

- Perez v. Rodriguez Bou, 575 F.2d 21, 23-24 (1st Cir. 1978) (suspensions of twelve days or less; no basis for emergency suspensions);
- Jordan v. School District of City of Erie, 583 F.2d 91, 96-97 (3d Cir. 1978) (removal from a class; provisions of consent decree as modified by court);
- Quintanilla v. Carey, C.A. No. 75-C-829 (N.D. Ill., Mar. 31, 1975) (Mem. Opin. and Order, pp. 4-5) (Clearinghouse No. 15,369A) (transfer equivalent to permanent expulsion; "School officials concede that plaintiff was not

expelled because he was a threat to the physical safety of the Kelvyn Park students or property. Absent such a showing of a threat to the safety of the students or school property, a student cannot be expelled before a hearing is given");

- Henderson v. Van Buren Public Schools Superintendent, C.A. No. 7-70865 (E.D. Mich., Dec. 29, 1978) (Opinion and Order, p. 2) (Clearinghouse No. 20,722) (one-day suspension; no basis for emergency suspension);
- Mrs. A.J. v. Special School District No. 1, 478 F. Supp. 418, 426 n.7 (D. Minn. 1979) (cumulative five-day suspensions; "conference" should precede extension of suspension absent emergency circumstances);
- Everett v. Marcase, 426 F. Supp. 397, 403-04 (E.D. Pa. 1977) (disciplinary transfers; "A transfer prior to final hearing, where there exists no emergency situation, would appear to violate the due process prescribed in Goss type suspensions");
- Brown v. Board of Education of Tipton County, C.A. No. 79-2234-M (W.D. Tenn., May 3, 1979) (Order Granting Prelim. Injunction, p. 2) (Clearinghouse No. 26,964H) (suspension pending school board appeals; practice of suspending from school "students who have charges placed against them in the Juvenile Court..."; Court orders in part: "The plaintiffs and plaintiff-intervenor may be suspended prior to a hearing only in emergency situations where the continued presence of the student in school, pending a hearing, poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process");
- Doe v. Rockingham County School Board, 658 F. Supp. 403, 407-08 (W.D. Va. 1987) (although there was basis for emergency exclusion, failure "to provide a hearing within a reasonable period of time after the date of the suspension, which would not normally exceed 72 hours" was inconsistent with Goss standard);

See also:

- Mitchell v. Board of Trustees, 625 F.2d 660, 662 n.4 (5th Cir. 1980) (where student is provided with preliminary, prior hearing "comport[ing] with the Goss requirements," pending full expulsion hearing, the suspension need not meet the emergency standard);
- Marcum v. Dahl, 658 F.2d 731, 735 (10th Cir. 1981) (students were not prejudiced by the lack of a hearing prior to nonrenewal of their basketball scholarships, since the hearing was provided prior to the effective date for the new scholarships).

For pre-Goss lower court decisions concerning the right to a prior hearing, see Center for Law and Education, *The Constitutional Rights of Students* 234 (1976). See also Chapter I.C.2., "Some Form of Notice and Hearing."

4. The Criteria for Emergency Suspension

The emergency exception to the requirement of prior hearing is designed to permit the school to take immediate action where it is actually necessary to stop or prevent immediate physical danger or extreme disruption. Again, the emergency exception should be read narrowly.

See:

- Rose v. Nashua Board of Education, 506 F. Supp. 1366, 1372 (D.N.H. 1981), *aff'd*, 679 F.2d 279 (1st Cir. 1982) (safety problems created by throwing burning papers, breaking window of passing car with snowball, and vandalism justified temporary suspension of bus routes prior to hearing);
- Gardenhire v. Chalmers, 326 F. Supp. 1200, 1204-05 (D. Kan. 1971) (presence of firearm in connection with events leading to criminal charge of attempted murder);
- Picozzi v. Sandalow, 623 F. Supp. 1571, 1578-79 (E.D. Mich. 1986) (denying re-enrollment of law student without prior hearing consistent with Goss where there was "a rising anxiety among the community's members over various incidents of violence, including the fire [in which plaintiff's involvement was suspected]..." [explanation added]);
- Davis v. Mann, 721 F. Supp. 796, 802 (S.D. Miss. 1988) (academic exclusion from dental school residency program, before hearing, proper where plaintiff "treat[ed] patients" and "school suspected that he had rendered inappropriate and substandard treatment");
- White v. Salisbury Township School District, 588 F. Supp. 608, 613 (E.D. Pa. 1984) (ten day suspension for smoking marijuana; having received official police report of arrests on school grounds, school officials were justified in immediately removing students from classes as their presence raised the possibility of danger to persons or property and threatened disruption of the academic process);
- Buck v. Carter, 308 F. Supp. 1246, 1247-48 (W.D. Wis. 1970) (armed attack and firing of gun);
- Stricklin v. Regents of University of Wisconsin, 297 F. Supp. 416, 420-21 (W.D. Wis. 1969), appeal dismissed as moot, 420 F.2d 1257 (7th Cir. 1970) (violence and strong indication that it would recur).

Compare:

- Felder v. Board of Education, 346 F. Supp. 722, 729-30 (D. Neb. 1972) (same);
- Marin v. University of Puerto Rico, 377 F. Supp. 613, 623-24 (D.P.R. 1974) (conditions for emergency suspension not met).

In Perez v. Rodriguez Bou, *supra*, 575 F.2d 21, 23-24 (1st Cir. 1978), the court held that students should be awarded damages for receiving suspensions without hearings, since the university chancellor "did not receive any information which would indicate that plaintiffs posed a threat to property, persons, or the orderly carrying out of academic and administrative affairs." The court so found despite the students' participation in a march in which unidentified students banged on the doors and windows of the chancellor's office, because this disturbance was only a brief period of disruption that day and it was later determined that plaintiffs had not participated in any disruptive behavior.

Similarly, in Henderson, *supra*, C.A. No. 7-70865, Slip Op. at 1-2 (E.D. Mich., Dec. 29, 1978) (Clearinghouse No. 20,722) (citation omitted), the court upheld a \$100 damage award for a one day suspension without hearing:

[S]tudents have certain rights to notice and hearing before they are suspended from school. These rights may be abridged only if there is overwhelming need on the part of school officials, for example, in the midst of great unrest in the school. School officials are charged with knowledge of this right. Further, in the instant case, the school in its student handbook guaranteed students the right to a hearing before suspension. The suspension in the instant case followed a student demonstration and unrest in the school. However, the plaintiff was not suspended on the day of the demonstration. It was not until the following morning that defendant Florido sent a notice of suspension to the plaintiff's mother, without according plaintiff notice or the right to a prior hearing. The jury was entitled to find that at the time the notice was sent the turmoil in the school had passed and with it the need to suspend prior to a hearing.

Narrow readings such as those in Perez and Henderson are needed to protect students' rights because imposition of a suspension without the regular suspension hearing creates the possibility of mistaken judgment which cannot be completely corrected after the fact. See Bradley v. Milliken, C.A. No. 35257 (E.D. Mich., July 3, 1975), in which the court found that the Detroit school system had abused "temporary exclusions" before hearings by not limiting them to conduct which "constitutes a serious threat...." The flexible nature of the Goss criteria for taking emergency action subjects this exception to different interpretations and to abuse.

The exception clearly is intended to apply only when it is *necessary* to take such action prior to a regular suspension hearing, *not* in situations where disruptive or violent conduct has occurred but is not an immediate continuing threat (e.g., a fight that is obviously over), *nor* in situations that can be handled without removing the student from school, *nor* in situations where removal may be necessary but it is still possible to provide at least a rudimentary informal hearing before ejecting the student (see below).

There are other limitations on the exception's applicability:

- A school may be required to specify narrower standards for emergency suspension when a suspension is imposed for activities protected by the first amendment. Some courts have required schools to define "substantial and material disruption" when applied to expressive activities. See §I.A.2., "Restrictions on Time, Place, Manner -- The Disruption Standard," in the Center's 1982 manual *School Discipline and Student Rights*.
- It can also be questioned whether "disruption" generally necessitates emergency suspension at all. Particularly where the disruption is confined to a single class, it should often be possible to eliminate the ongoing nature of the disruption through some other means, such as temporarily removing the student from that class that day and giving him or her a chance to cool down, talk, and otherwise relieve the tension.
- The standard for emergency suspension in *Mills v. Board of Education*, 348 F. Supp. 866, 883 (D.D.C. 1972) (suspension for more than two days), is based only on physical danger to persons, not disruption or danger to property.

For discussion of alternative education during the time a student is suspended from his/her regular program, see §XIII.B.3., "Right to Education for Excluded Students" in the Center's 1982 manual *School Discipline and Student Rights*.

5. Preliminary or Interim Hearing

As discussed above, the Supreme Court held in *Goss v. Lopez* that the suspension hearing must normally precede the suspension. Where an emergency situation justifies a delay in the normal procedures, the hearing must occur as soon as practicable, no later than three days after the student is excluded. Even where an emergency necessitates delay of a full hearing, there is support for requiring that, in order to minimize mistakes, any less extensive procedures or fact finding which can reasonably be provided prior to the suspension must be provided. In *Stricklin*, *supra*, 297 F. Supp. 416, 420 (W.D. Wis. 1969), Judge Doyle stated:

When the appropriate university authority has reasonable cause to believe that danger will be present if a student is permitted to remain on the campus pending a decision following a full hearing, an interim suspension may be imposed. But the question persists whether such an interim suspension may be imposed without a prior "preliminary hearing" of any kind. The constitutional answer is inescapable. An interim suspension may not be imposed without a prior preliminary hearing, unless it can be shown that it is impossible or unreasonably difficult to accord it prior to an interim suspension. Moreover, even when it is impossible or unreasonably difficult to accord the student a preliminary hearing prior to an interim suspension, procedural due

process requires that he be provided such a preliminary hearing at the earliest practical time. In the absence of such a requirement, a student may be suspended in an *ex parte* proceeding, for as much as 13 and probably about 18 days (as in the present cases), without any opportunity, however brief and however limited, to persuade the suspending authority that there is a case of mistaken identity or that there was extreme provocation or that there is some other compelling justification for withholding or terminating the interim suspension.

Accord: Martin, *supra*, 377 F. Supp. 613 (D.P.R. 1974).

In Buck v. Carter, *supra*, 308 F. Supp. 1246, 1248-49 (W.D. Wis. 1970), Judge Doyle detailed the nature of this preliminary process. First, the administrator should "make such immediate further investigation as the circumstances would reasonably permit." Second, the administrator should inquire into whether the circumstances of the conduct were such that "the prompt separation of the actor from the life of the campus community is required by reasons relating to his physical or emotional safety and well-being, or for reasons relating to the safety and well-being of students, faculty, or university property." Third, the student should be provided with a preliminary hearing at which he or she is "informed of the nature of the offense of which he has been accused, and ... given an opportunity to make such statement as he may wish...." According to the court, this procedure may be sufficient if no serious factual disputes remain; however:

On the other hand, if the student offers a detailed statement to the effect that he was not present at the time and place of the incident, and that there are witnesses, whom he identifies, to the fact that he was elsewhere at the time, it is probably constitutionally necessary to make such prompt investigation of his alibi as the circumstances permit. If the student admits his presence at the time and place of the incident, but offers a plausible explanation of his part in it which, if believed, might reasonably constitute an excuse or might reasonably indicate that his continued presence in the campus community involves no serious danger, it may become constitutionally necessary to reveal more fully the source and nature of the contradictory information which has been received by the university about his part in the incident, and even, if practical, to provide the accused student with an opportunity to confront one or more of his accusers.

See Martin, *supra*, 377 F. Supp. 613 (D.P.R. 1974).

Thus, students whose conduct appears to make it impossible to provide a regular hearing prior to the suspension are entitled whatever prior, rudimentary procedures can be provided *in addition to* the regular hearing as soon thereafter as is practicable. From an different perspective, students who are awaiting a more formal hearing (such as a school board expulsion hearing) can be suspended in the interim only if they have been provided with a hearing adequate to cover the interim period, taking into account its length. See cases discussed in the earlier portions of this section; see also Chapter III.C., "Timing of the Hearing."

B. NOTICE

The fundamental requisite of due process of law is the opportunity to be heard,' a right that 'has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to ... contest.' At the very minimum, therefore, students facing suspension and the consequent interference with a protected property interest must be given *some* kind of notice and afforded *some* kind of hearing.

Goss v. Lopez, 419 U.S. 565, 579, 95 S.Ct. 729, 738 (1975)
(citations omitted; emphasis in original).

"The key to notice in the administrative process is adequate opportunity to prepare...."

K.C. Davis, Administrative Law Treatise §805
(1958).

See also "Some Form of Notice and Hearing" in Chapter I.C., "What Kind of Due Process: Balancing Test."

1. Notice in Writing

Many lower court decisions have stated that notice should be in writing.

See:

- Jordan v. School District of City of Erie, 583 F.2d 91, 97-98 (3d Cir. 1978)
(consent decree) (disciplinary transfer of six weeks to a year);
- Esteban v. Central Missouri State College, 277 F. Supp. 649, 651, (W.D. Mo. 1967), *approved*, 415 F.2d 1077, 1089 (8th Cir. 1969), *cert. denied*, 398 U.S. 965 (1970) (suspension for two semesters);
- Doe v. Kenny, C.A. No. H-76-199 (D. Conn., Oct. 12, 1976) (consent decree, p. 3) (Clearinghouse No. 19,358C) (disciplinary transfer);
- Mills v. Board of Education, 348 F. Supp. 866, 882-83 (D.D.C. 1972)
(suspension or other exclusion from the student's normal program for more than two days, but no more than ten days);
- Mello v. School Committee of New Bedford, C.A. No. 72-1146-F (D. Mass., Apr. 6, 1972) (Temporary injunction, p. 2) (Clearinghouse No. 7,773);

- Behagen v. Intercollegiate Conference of Faculty Representatives, 346 F. Supp. 602, 608 (D. Minn. 1972) (suspension from basketball practices);
 - Speake v. Grantham, 317 F. Supp. 1253, 1258 (S.D. Miss. 1970) (suspension);
 - Sykes v. Sweeney, 638 F. Supp. 274, 276 n. 1, 278 (E.D. Mo. 1986) (oral notice to mother on day of incident and letter the following day provided "proper notice of the charges");
 - Scoggin v. Lincoln University, 291 F. Supp. 161, 171 (W.D. Mo. 1968) ("longterm suspension");
 - Fielder v. Board of Education, 346 F. Supp. 722, 724 (D. Neb. 1972) (expulsion for remainder of year);
 - Morale v. Grigel, 422 F. Supp. 988, 1003 (D.N.H. 1976) (suspension for one semester);
 - Vall v. Board of Education, 354 F. Supp. 592, 603 (D.N.H. 1973), *remanded for add'l relief*, 502 F.2d 1159 (1st Cir. 1973) (suspension beyond 5 days);
 - Winters v. Board of Education of City of Buffalo, C.A. No. 78-75 (W.D.N.Y., May 25, 1978) (stipulation for entry of judgment, pp. 3, 7, and judgment) (Clearinghouse No. 24,455) (suspension beyond five days);
 - Givens v. Poe, 346 F. Supp. 202, 209 (W.D.N.C. 1972) (suspension "for any considerable period of time");
 - Bobbi Jean M. v. Wyoming Valley West School District, C.A. No. 79-576 (M.D. Pa., Nov. 3, 1980) (consent decree, p. 6 and Sample Notice) (Clearinghouse No. 30, 528B) (exclusion beyond ten days);
 - Caldwell v. Cannady, No. CA-5-994 (N.D. Tex., Jan. 25, 1972) (Mem. Opinion, pp. 2, 4) (Clearinghouse No. 7,424) (expulsion for remainder of semester);
 - Sullivan v. Houston Independent School District, 307 F. Supp. 1328, 1346 (S.D. Tex. 1969) ("suspension for a substantial period of time");
 - Gratton v. Winooski School District, C.A. No. 74-86 (D. Vt., Apr. 10, 1974) (Preliminary Injunction, p. 5) (Clearinghouse No. 45,539) (indefinite suspension);
 - Marzette v. McPhee, 294 F. Supp. 562, 567 (W.D. Wis. 1968) ("suspension or expulsion");
 - North v. West Virginia Board of Regents, 233 S.E.2d 411, 417 (W.Va. 1977) (expulsion: "a formal written notice of charges").
- Cf.:
- Takeall v. Ambach, 609 F. Supp. 81, 87 (S.D.N.Y. 1985) (written notice of reasons and administrative remedies is required for denial of admission to public school program);

- Hairston v. Drosick, 423 F. Supp. 180, 184 (S.D. W. Va. 1976) (transfer into special education classes);
- Mifflin County School District v. Stewart, 94 Pa. Commw. 313, 503 A.2d 1012 (Pa. Commw. Ct. 1986) (three and four day suspensions; written notice is required by Pennsylvania regulation).

But see:

- Davis v. Ann Arbor Public Schools, 313 F. Supp. 1217, 1226-27 (E.D. Mich. 1970) (suspension for remainder of semester; student and parent had full knowledge of the reasons for the proposed discipline);
- Warren v. National Association of Secondary School Principals, 375 F. Supp. 1043, 1047 (N.D. Tex. 1974) (dismissal from honor society; student was aware of the charges and the proceeding);
- Doe v. Rockingham County School Board, 658 F. Supp. 403, 407 (W.D. Va. 1987) (as a result of conversation with superintendent, father had "ample notice of the reasons" for son's suspension);
- Jones v. Board of Trustees, 524 So. 2d 968, 972 (Miss. 1988) ("not clear that...Jones lacked any informal notice of the Vivarin allegations" which were not included in notice letter);
- Rutz v. Essex Junction Prudential Committee, 457 A.2d 1368, 1370-75 (Vt. 1983) (expulsion; absence of written notice not a due process violation where student and parent had actual notice, student admitted guilt, and there was no prejudice).

2. Notifying Parents

Lower courts in cases involving primary or secondary school students, but not university students, have stated that the parent as well as the student should receive notice.

See:

- Doe v. Kenny, *supra*, C.A. No. H-76-199 (D. Conn., Oct. 12, 1976) (Consent Decree, p. 3) (Clearinghouse No. 19,358C);
- Mills, *supra*, 348 F. Supp. at 882-83 (D.D.C. 1972);
- Graham v. Knutson, 362 F. Supp. 881, 885 (D. Neb. 1973) (all suspensions);
- Fiedler, *supra*, 345 F. Supp. at 724 n.1 (D. Neb. 1972);
- Vall, *supra*, 354 F. Supp. at 603 (D.N.H. 1973);

- Winters, *supra*, C.A. No. 78-75 (W.D.N.Y., May 25, 1978) (Stipulation for Entry of Judgment, pp. 3-7) (Clearinghouse No. 24,455);
- Givens v. Poe, *supra*, 346 F. Supp. at 211 (W.D.N.C. 1972);
- Bobbi Jean M., *supra*, C.A. No. 79-576 (M.D. Pa., Nov. 3, 1980) (Consent Decree, p. 6) (Clearinghouse No. 30,528B);
- Caldwell, *supra*, No. CA-5-994 (N.D. Tex., Jan. 25, 1972) (Memorandum Opinion, p. 4) (Clearinghouse No. 7,424);
- Sullivan, *supra*, 307 F. Supp. at 1346 (S.D. Tex. 1969);
- Doe v. Rockingham County School Board, *supra*, 658 F. Supp. at 407 (W.D. Va. 1987);
- Hairston, *supra*, 423 F. Supp. at 184-85 (S.D. W. Va. 1976);
- Keller v. Fochs, 385 F. Supp. 262, 266 (E.D. Wis. 1974) (expulsion for remainder of year).

See also:

- Ross v. Disare, 500 F. Supp. 928 (S.D.N.Y. 1977) (suspensions beyond five days; statutory requirement of notice to parent);
- Mifflin County, *supra*, 94 Pa. Commw. 313, 503 A.2d 1012 (Pa. Commw. 1986) (regulation required notice to student and parents).

Compare Morale, *supra*, 422 F. Supp. 988, 1003 (D.N.H. 1976) (notice to parent not required where student is not a minor).

The notice requirement for short term suspensions was articulated by the Supreme Court in Goss v. Lopez, *supra*, 419 U.S. 565, 581, 95 S.Ct. 729, 740 (1975). (Where unusual circumstances exist, different requirements may apply; see Chapter II.A.) In Goss, the Court mandated only that "the student be given oral or written notice of the charges against him...." Note, however, that the focus of both parties in Goss had been on the complete absence of procedural due process, not on the particular procedures which should have been required. Also note that the lower court had held that written notice to the parent was required, and the Supreme Court, after repeating the lower court's holdings, stated, "We affirm." 419 U.S. at 572, 95 S.Ct. at 735.

In any event, the precedents of lower courts concerning written notice to the parent would likely apply to suspensions of more than ten days. Further, notice to the parent in some fashion, an issue not explicitly addressed by the Supreme Court, seems legally appropriate even for short suspensions, given the protected interest (under the due process clause) which parents have in their children's education.

See:

- Pierce v. Society of Sisters, 268 U.S. 510, 534-35, 45 S.Ct. 571, 573 (1925);
- Meyer v. Nebraska, 262 U.S. 390, 399-400, 43 S.Ct. 625, 626-27 (1923);
- Sullivan, *supra*, 307 F. Supp. 1328, 1343 (S.D. Tex. 1969).

See also:

- Brown v. Board of Education of Tipton County, C.A. No. 79-2234 (W.D. Tenn., May 3, 1979) (Order Granting Preliminary Injunction, pp. 2, 3) (Clearinghouse No. 26,964H) (for suspensions of up to ten days, parents must be sent notices which describe the charges and the procedure for obtaining review of the principal's decision);
- Kraut v. Rachford, 51 Ill. App. 3d 206, 214, 366 N.E.2d 497, 503 (Ill. Ct. App. 1977) (student dropped for non-residency; "where the interests of a minor student are involved, his parents should be notified of the pending action").

Also, most states have statutes making the parent responsible for the child's attendance under compulsory attendance laws. See Sullivan, *supra*, 307 F. Supp. at 1343 (S.D. Tex. 1969). For further discussion, see Chapter I.B.6., "Parents' Right to Due Process", including citations to decisions rejecting claims of parental rights in the discipline process.

3. Language of the Notice

The consent decree in Doe v. Kenny, *supra*, C.A. No. H-76-199 (D. Conn., Oct. 12, 1976) (Clearinghouse No. 19,358C), requires that the statement of rights contained in the notice be printed in Spanish and English (at p. 3). The consent judgment in Smith v. Ryan, C.A. No. B-75-309 (D. Conn., Oct. 25, 1978) (Clearinghouse No. 25,461A) (all forms of discipline) provides (at p. 2):

All notices, written or oral, required by this policy shall be in English and in the primary language of the home. All notices shall be made in simple and commonly understood words to the extent possible....

The obligations of school systems concerning the language of the notice can be viewed in terms of both due process and non-discrimination. First, "the opportunity to be heard must be tailored to the capacities and circumstances of those to be heard." Goldberg v. Kelly, 397 U.S. 254, 268-69, 90 S.Ct. 1011, 1021 (1970). Further, that opportunity "must be granted at a meaningful time and in a meaningful manner." Armstrong v. Manzo, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191 (1965). Second, under the Equal Educational Opportunities Act of 1974, 20 U.S.C. §1703(f), educational agencies must "take appropriate action to overcome

language barriers that impede equal participation by its students in its instructional programs." Similarly, under the regulations for Title VI of the 1964 Civil Rights Act, 42 U.S.C. §2000d, 34 C.F.R. §100.3(b)(2), all recipients of federal funds are prohibited from using criteria or methods of administration which have the effect of discriminating on the basis of national origin or which have the effect of substantially impairing the accomplishment of the objectives of the program for individuals of a particular national origin. Pursuant to Title VI, the Department of Education issued a memorandum (35 C.F.R. 11595) (May 25, 1970) stating:

School districts have the responsibility to adequately notify national origin-minority group parents of school activities which are called to the attention of other parents. Such notice in order to be adequate may have to be provided in a language other than English.

See also:

- Lau v. Nichols, 414 U.S. 563, 567-68, 94 S.Ct. 786, 788-89 (1974) (failure to address language needs of Chinese students violated Title VI; citing 1970 memorandum).
- Martin Luther King Jr. Elementary School Children v. Ann Arbor School District, 473 F. Supp. 1371 (E.D. Mich. 1979) (failure to address language needs of students who speak "black English" under Equal Educational Opportunities Act).

See also §V.A.1., "Language of the Rules" and §III.A., "Race and National Origin Discrimination" in the Center's 1982 manual *School Discipline and Student Rights*, and "Chapter III.F.2., "Right to an Interpreter".

4. Timing of the Notice

See Chapter III.C., "Timing of the Hearing."

5. Unsuccessful Attempts to Notify

In Wright v. Texas Southern University, 392 F.2d 728 (5th Cir. 1968) (denial of readmission), the court held that failure to notify a student is not a denial of due process where the school makes diligent attempts and the student has failed to notify the school of his or her current address in violation of the school's regulations. Similarly, in Morale v. Grigel, *supra*, 422 F. Supp. 988, 1003 (D.N.H. 1976), the court held that a student's "refusal to accept the written notice cannot serve as the basis of a constitutional claim against the school."

6. Notice of the Proposed Discipline

Some courts have held that students have a right to notice of the proposed disciplinary action.

See:

- Mills, supra, 348 F. Supp. 866, 882 (D.D.C. 1972) ("describe the proposed disciplinary action in detail, including the duration thereof");
- Kelley v. Johnson, C.A. No. 75-91 (D.N.H., Feb. 12, 1976) (Opinion, p. 6) (Clearinghouse No. 20,622) (four-day suspension; oral notice inadequate because, although it informed student as to generally what was involved, it did not specifically state that disciplinary action was going to be taken and might result in suspension);
- Corr v. Mattheis, 407 F. Supp. 847, 853-54 (D.R.I. 1976) (notice of hearing to consider disciplinary action against students insufficient for failing to inform them as to possible penalty of cut-off of financial aid).

Cf.

- Hairston v. Drosick, supra, 423 F. Supp. 180, 184 (S.D. W.Va. 1976) (due process notice requirements for transfer to special education classes would be met by implementing regulations which include notice "describing in detail the proposed or requested action").

But see:

- Rosa R. v. Connelly, 889 F.2d 435, 438-39 (2d Cir. 1989) (student not informed when seeking postponement of expulsion hearing of "possible denial of credit for time served..."; "The notice requirement of due process does not require that school administrators provide a detailed listing of all possible courses of action for which discipline might be imposed or of all possible penalties."; however, student had ample notice and opportunity to challenge denial of credit for "time served" and to appeal school board's decision to the state board of education, before alleged deprivation took effect);
- Palmer v. Merluzzi, 868 F.2d 90, 94 (3d Cir. 1989) (60-day suspension from high school athletics; no requirement of notice of possible penalties where they "are knowable from previously published materials or are obvious from the circumstances");
- Keough v. Tate County Board of Education, 748 F.2d 1077, 1081 (5th Cir. 1984) (notice that student's "status" would be discussed at hearing was adequate notice of "nature of...hearing" where expulsion for remainder of year eventuated).

7. Notice of the Charges

(a.) Specificity

The basic element of the right to notice is notice of "the charges." However, that term needs to be defined for school officials, students and parents in order to insure that the student and parent will have effective notice. This demands a certain degree of specificity.

See:

- Wasson v. Trowbridge, 382 F.2d 807, 812 (2d Cir. 1967) (dismissal from Merchant Marine Academy);
- Williams v. Dade County School Board, 441 F.2d 299, 302 (5th Cir. 1971) (long term suspension; "specific notice of the charges");
- Crook v. Baker, 813 F.2d 88, 97 (6th Cir. 1987) (revoking of degree for fraud; letter informed graduate that "thesis data fabrication was charged");
- Esteban v. Central Missouri State College, *supra*, 277 F. Supp. at 651 (W.D. Mo. 1967), approved, 415 F.2d at 1089 (8th Cir. 1969) ("...written notice of the precise charge...");
- Picozzi v. Sandalow, 623 F. Supp. 1571, 1580 (E.D. Mich. 1986) (written notice identified "precisely the question...finally adjudicated");
- Davis v. Mann, 721 F. Supp. 796, 803 (S.D. Miss. 1988) (academic exclusion from dental school residency program; "...the prehearing notice of charges did not apprise Davis in sufficient detail of the complaints about his record keeping or of some of the asserted deficiencies in treatment"; problem cured by "one week lapse" before plaintiff required to respond);
- Sykes v. Sweeney, *supra*, 638 F. Supp. at 276 n.1, 278 (E.D. Mo.) (letter "adequately informed the Sykes of the charges");
- Scoggin, *supra*, 291 F. Supp. at 171 (W.D. Mo. 1968);
- Givens v. Poe, *supra*, 346 F. Supp. at 209 (W.D.N.C. 1972);
- Corr v. Mattheis, *supra*, 407 F. Supp. at 853 (D.R.I. 1976);
- Labrosse v. St. Bernard Parish School Board, 483 So.2d 1253, 1257-58 (La. App. 1986) (student's expulsion could not be upheld on the basis of statutory violations not set forth in the notice which he had been given);
- Warren County Board of Education v. Wilkinson, 500 So. 2d 455, 461 (Miss. 1986) (denial of semester's credit; failure to abide by school rules concerning written notice constituted denial of due process; notice of date of hearing alone is insufficient; notice must state what rule was violated);
- Carey v. Savino, 91 Misc. 2d 50, 397 N.Y.S.2d 311 (N.Y. Sup. Ct. 1977) (expulsion; notice must contain a statement not merely of who observed the

alleged wrongful actions, but must also clearly allege the facts upon which the charges are based.)

See also:

- Ross v. DiSare, 500 F. Supp. 928, 934 (S.D. N.Y. 1977) (suspensions in excess of five days; failure to notify parents of reasons for suspension violated state statute).

For example, courts found that the particular notices below lacked sufficient specificity:

- "Such statements as 'your son ... continues to conduct himself in an irresponsible and disruptive manner' and 'he has been deliberately defiant of reasonable requests by his teachers,' 'on three occasions within the past few weeks,' without more in terms of approximate dates and at least some recitation of detail significant enough to identify the conduct to the plaintiff, do not comport with ... due process," Keller v. Fochs, *supra*, 385 F. Supp. 262, 266 (E.D. Wis. 1974);
- "I find that harm to this University may result if you are continued in your present position," Lafferty v. Carter, 310 F. Supp. 465, 467, 469 (W.D. Wis. 1970) (professors suspended);
- "Willful refusal to obey a regulation or order ... which contributed to a substantial disruption....," Scott v. Alabama State Board of Education, 300 F. Supp. 163, 166 (M.D. Ala. 1969) (indefinite suspension).

But see:

Pierce v. School Committee, 322 F. Supp. 957, 962 (D. Mass. 1971) (notice of extended period of disruptive activities similar to Keller was held sufficient in considering expulsion of student who had a lengthy previous disciplinary record).

In Scoggin, *supra*, 291 F. Supp. 161, 169 (W.D. Mo. 1968), the charge of "planning and/or participating in a demonstration which led to the destruction of University property on Wednesday, October 18, 1967, at the Student Union Building," was held to be insufficient in that it failed to distinguish between those acts of planning and participation which were alleged to lead to the property destruction and the otherwise legally protected aspects of planning and participating in a demonstration. (See Substantive Rights, §I.B.5., "Assembly" in the Center's 1982 manual *School Discipline and Student Rights*.) Compare Jenkins, *supra*, 506 F.2d 992, 1000-01 (5th Cir. 1975).

But see:

- Keough v. Tate County Board of Education, 748 F.2d 1077, 1081 (5th Cir. 1984) ("letter...substantially set forth the charges...");

- Jenkins v. Louisiana State Board of Education, 506 F.2d 992, 999-1001 (5th Cir. 1975);
- Whiteside v. Kay, 446 F. Supp. 716, 721 (W.D. La. 1978) (expulsion for remainder of year);
- Pollnow v. Glennon, 594 F. Supp. 220, 221 n.1 (S.D.N.Y. 1984) (suspension for remainder of school year and following semester; "A general notice [to parents] of a disciplinary hearing has been held sufficient when a student receives notice of specific charges by other means," citing Matter of Dwalleebe, 17 Educ. Dept. Rep. 308 (N.Y. Educ. Comm'r 1978));
- Alex v. Allen, 409 F. Supp. 379, 386-87 (W.D. Pa. 1976) (30 day suspension);
- Stratton v. Wenona Community Unit District No. 1, 551 N.E. 2d 640 (Ill. 1990) (expulsion; written notice that board would consider expulsion "for gross misconduct, disobedience, and disrespect" was adequate where "[t]here were no acts of misconduct of which the Strattons were unaware. The Strattons knew that the proceeding represented the culmination of a pattern of misbehavior by Anthony, rather than punishment for any particular incident.").

Specificity in the notice serves several related purposes. It insures that the student and parent know what to prepare for and what kinds of issues they will need to address in the student's defense.

See:

- Navato v. Sletten, 560 F.2d 340, 346 (8th Cir. 1977) (denial of certificate of completion of residency program);
- Matter of Grandal, 11 Educ. Dept. Rep. 144 (N.Y. Educ. Comm'r 1972) (suspension for remainder of year).

Cf.:

- McGhee v. Draper, 564 F.2d 902, 911 (10th Cir. 1977) (discharge of nontenured teacher: "A hearing where the plaintiff was faced with such a blast of complaints, and not knowing which incidents she needed to discuss, did not satisfy due process").

Specificity in the notice provides meaning to the requirement that the hearing be confined in scope to the initial charges. See Chapter III.F.8.(b.), "Rules of Evidence." Cf. Gonzales v. McEuen, 435 F. Supp. 460, 469 (C.D. Cal. 1977) (expulsion for remainder of year).

Specificity further provides meaning to the requirement that a finding of misconduct be based on a determination that the student committed the act(s) with which he or she was initially charged and that such conduct violates the rules

in the initial charge. See Chapter III.G.2., "Determination of Misconduct." Finally, the parent and student must understand the specifics of the charge in order to give a knowing waiver of the right to a hearing. Cf. Henderson v. Morgan, 426 U.S. 637, 96 S.Ct. 2253 (1976).

(b.) Elements of the Charges

One common formulation of proper notice is "the specific charges and grounds which, if proven, would justify expulsion [or suspension] under the regulations of the Board of Education."

See:

- Sweet v. Childs, 507 F.2d 675, 681 (5th Cir. 1975) (expulsion from high school for remainder of year);
- Dixon v. Alabama State Board of Education, 294 F.2d 150, 158 (5th Cir. 1961), cert. denied, 368 U.S. 930 (1961) (expulsion);
- Vought v. Van Buren Public Schools, 306 F. Supp. 1388, 1393 (E.D. Mich. 1969) (expulsion for remainder of year);
- Behagen, supra, 346 F. Supp. 602, 608 (D. Minn. 1972) (suspension from basketball practices);
- Winters, supra, C.A. No. 78-75 (W.D.N.Y., May 25, 1978) (Stipulation for Entry of Judgment, p. 5) (Clearinghouse No. 24,455) ("a detailed statement of the specific behavior of the student").

Even this formulation fails to supply enough guidance as to the meaning of "charges." A better indication of the components of the charge would be a breakdown into (a) the alleged facts or acts of the students and (b) the regulations which such acts are claimed to violate. See, e.g., Mills, supra, 348 F. Supp. 866, 882 (D.D.C. 1972) ("state specific, clear and full reasons for the proposed action, including the specification of the alleged act upon which the disciplinary action is based and the reference to the regulation subsection under which such action is proposed").

(c.) Nature of Evidence and List of Witnesses

Some courts have also stated that the notice should include details of the nature of the evidence.

See:

- Crook v. Baker, supra, 813 F.2d at 97 (6th Cir. 1987) (revoking of degree for fraud; "evidentiary basis" of charge identified);

- Doe v. Kenny, *supra*, C.A. No. H-76-199 (D. Conn., Oct. 12, 1976) (Consent Decree, p. 3) (Clearinghouse No. 19, 358C) ("the details of the grounds for the proposed transfer, including a narrative of events leading to the proposed action and the names of 'witnesses against the student'");
- Quintanilla v. Carey, C.A. No. 75-C-829 (N.D. Ill., Mar. 31, 1975) (Mem. Opin. and Order, p. 6) (Clearinghouse No. 15,369A) (expulsion with opportunity for G.E.D. program; "...a short summary of the evidence the defendants intend to rely upon");
- PUSH v. Carey, C.A. Nos. 73-C-2522, 74-C-303 (N.D. Ill., Nov. 5, 1975) (Mem. Opin. and Order, p. 9) (Clearinghouse No. 17,507A) (suspensions which potentially exceeded 10 days), *rev'd in part on other grounds*, 545 F.2d 30 (7th Cir. 1976) (reversed because of lower court's failure to award damages to students), *rev'd on other grounds sub nom. Carey v. Piphus*, 435 U.S. 247, 98 S.Ct. 1042 (1978) (reversed on damage issue) (same as Quintanilla);
- Scoggin, *supra*, 291 F. Supp. at 171 (W.D. Mo. 1968) ("...nature of the evidence on which the disciplinary proceedings are based");
- Vail, *supra*, 354 F. Supp. at 603 (D.N.H. 1973) ("nature of the evidence against the accused student");
- Bobbi Jean M., *supra*, C.A. No. 79-576 (M.D. Pa., Nov. 3, 1980) (Consent Decree, p. "SAMPLE NOTICE") (Clearinghouse No. 30,528B) ("list of witnesses ...[and]... copies of [their] statements and affidavits...");
- Marin v. University of Puerto Rico, 377 F. Supp. 613, 623 (D.P.R. 1974) (suspension in excess of a year; "...adequate advance notice to the student of... the evidence against the student...");
- Sullivan, *supra*, 307 F. Supp. at 1346 (S.D. Tex. 1969) ("formal written notice of the...evidence against him...");
- Sofair v. State University of New York, 388 N.Y.S. 2d 453, 458 (N.Y. App. 1976) (academic dismissal from medical school; notice must contain "detailed written statement of the evidence relied upon in concluding that [petitioner] lacked clinical aptitude...").

Cf.:

- Keough v. Tate County Board of Education, 748 F.2d 1077, 1081-82 (5th Cir. 1984) (where parents had full notice of the charges, the underlying facts, the nature of the hearing, the range of sanctions, and their right to an attorney, court found that the lack of a witness list caused no material prejudice).

But see:

- Nash v. Auburn University, 812 F.2d 655, 662-63 (11th Cir. 1987) (suspension for academic dishonesty; "...in...academic disciplinary process appellants were not constitutionally entitled to advance notice of statements by witnesses who, along with the appellants, were to appear at the hearing.");

- Whiteside v. Kay, *supra*, 446 F. Supp. at 721 (W.D. La. 1978) (no requirement of "a list of witnesses and a summary of their testimony").

When speaking of the requirements for short suspensions in Goss v. Lopez, *supra*, 419 U.S. 565, 581, 582, 95 S.Ct. 729, 740 (1975), the Supreme Court mentioned "an explanation of the evidence" and "what the basis of the accusation is." It is not clear whether the Court considered this requirement to be part of the notice or part of the hearing. A superintendent's "disclos[ing] to the school board, during their closed deliberations, new evidence which had not been presented during the open hearing..." was inconsistent with this element of Goss. See Newsome v. Batavia Local School District, 842 F.2d 920, 927 (6th Cir. 1988) (expulsion for remainder of semester). See also Cleveland Board of Education v. Loudermill, 470 U.S. 532, 546, 105 S.Ct. 1487, 1495 (1985): "The tenured public employee is entitled to oral or written notice of the charges against him [and] an explanation of the employer's evidence...." Compare Paredes v. Curtis, 864 F.2d 426, 429-30 (6th Cir. 1988) (ten-day suspension; distinguishing Newsome where written statement of student informant, access to which was denied, was not relied upon by school officials and did not vary materially from oral report which was used).

Names of witnesses and the nature of their testimony in the notice has been required by courts in Caldwell v. Cannady, *supra*, No. CA-5-994 (N.D. Tex., Jan. 25, 1972) (Mem. Opin., p. 5) (Clearinghouse No. 7,424), and Graham v. Knutzen, *supra*, 362 F. Supp. at 885 (D. Neb. 1973).

Other courts have required that students be given notice of evidence, access to written evidence, and/or notice of witnesses in advance of the hearing without necessarily requiring that they appear in the notice of the hearing itself. See Dixon v. Alabama State Board of Education, *supra*, 294 F.2d at 159 (expulsion; "In the instant case, the student should be given the names of the witnesses against him and an oral or written report on the facts to which each witness testifies."); Williams v. Dade County School Board, *supra*, 441 F.2d at 302 (long-term suspension; "the names of witnesses with a summary of their testimony"). See also §XI.D. of the Center's 1982 *School Discipline and Student Rights* manual.

8. Notice of Time and Place of Hearing

Failure to specify time and place of the hearing, of course, denies a meaningful opportunity to be heard and thus violates the basic tenet of due process. See Strickland v. Inlow, 519 F.2d 744, 746 (8th Cir. 1975) and cases cited therein.

See also:

- Doe v. Kenny, *supra*, C.A. No. H-76-199 (D. Conn., Oct. 12, 1976) (Consent Decree, p. 3) (Clearinghouse No. 19, 358C);
- Mills, *supra*, 348 F. Supp. at 882 (D.D.C. 1972);

- Bobbi Jean M., *supra*, C.A. No. 79-576 (M.D. Pa., Nov. 3, 1980) (Consent Decree, p. 6) (Clearinghouse No. 30, 528B).

The issues concerning time of the hearing, including the relation to the time of notice, are discussed in chapter III.C.

9. Notice of Procedural Rights

The suspension-expulsion procedures grant parents or guardians and students many rights, *e.g.*, the right to request the presence of certain individuals and the right to be accompanied by legal counsel if so requested. As the testimony of Mr. Webster and Mrs. Fuller indicates, many parents may not realize that they have these rights and there is no procedure presently in effect which so informs the parties. Consequently, parents and students may lose some rights which are contingent upon request simply because they did not know such a right existed.

The opportunity to be heard must be 'granted at a meaningful time and in a meaningful manner.' The Court finds that ignorance of the procedures in question and the rights thereunder may deprive the students and parents of a meaningful hearing. The burden on the school authorities, on the other hand, is slight. As long as they provide the parents or guardians and students facing disciplinary action with reasonable notice of their rights under the procedures, due process is satisfied. While it is not for the Court to prescribe the exact method of implementing this duty, it should be noted that counsel for the defendants stated during oral argument that there would be no objection to enclosing a copy of the procedures in the letter sent to the parents or guardians explaining the reasons for the suspension or expulsion.

Graham v. Knutzen, *supra*, 362 F. Supp. at 883-84 (D. Neb. 1973).

Accord:

- Gonzales v. McEuen, *supra*, 435 F. Supp. 460, 467 (C.D. Cal. 1977) ("Notice to be adequate must communicate to the recipient the nature of the proceeding. In an expulsion hearing, the notice given to the student must include a statement not only of the specific charge, but also the basic rights to be afforded to the student;" expulsions held to be illegal because of the notice's failure to inform students of these rights);
- Doe v. Kenny, *supra*, C.A. No. H-76-199 (D. Conn., Oct. 12, 1976) (Consent Decree, p. 3) (Clearinghouse No. 19, 358C);
- Mills, *supra*, 348 F. Supp. at 882 (D.D.C. 1972);
- Winters, *supra*, C.A. No. 78-75 (W.D.N.Y., May 25, 1978) (Stipulation for Entry of Judgment, p. 5) (Clearinghouse No. 24,455);

- Bobbi Jean M., *supra*, C.A. No. 79-576 (M.D. Pa., Nov. 3, 1980) (Consent Decree, p. 6) (Clearinghouse No. 30, 528B).

Cf.:

- Memphis Light, Gas & Water Division v. Craft, *supra*, 436 U.S. 1, 14-15, 98 S.Ct. 1554, 1563 (1978) (termination of utility services);
- Takeall v. Ambach, 609 F. Supp. 81, 86-87 (S.D. N.Y. 1985) (denial of enrollment in school system for asserted lack of residence).

See also:

- Tedeschi v. Wagner College, 427 N.Y.S. 2d 760, 765 (N.Y. 1980) (suspension from college, in part for disciplinary reasons; "...obligation of the college in effecting the suspension to call plaintiff's attention to the further procedures provided for by the guidelines..."; ruling based on contractual rights and law of associations).

Specific procedural rights are spelled out below in other sections of this chapter.

10. Notice of Sources of Legal Assistance

See generally Chapter III.F.1., "Right to Counsel or Other Representation."

See also:

- Jordan, *supra*, 583 F.2d at 99 (3d Cir. 1978) ("Inform the parent or guardian and student of the availability of various organizations, such as Erie County Legal Services, to assist them in connection with Hearing II and provide the address and telephone number of such organizations in the notice");
- Mills, *supra*, 348 F. Supp. at 881 (D.D.C. 1972) ("If a child is unable, through financial inability, to retain counsel, defendants shall advise child's parents or guardians of available voluntary legal assistance...");
- Winters, *supra*, C.A. No. 78-75 (W.D.N.Y., May 25, 1978) (Stipulation for Entry of Judgment, pp. 7-8) (Clearinghouse No. 24,455) (sources for securing counsel, including legal services attorneys);
- Bobbi Jean M., *supra*, C.A. No. 79-576 (M.D. Pa., Nov. 3, 1980) (Consent Decree, p. "SAMPLE NOTICE") (Clearinghouse No. 30,528B);
- Hairston v. Drosick, *supra*, 423 F. Supp. at 185 (S.D. W. Va. 1976) (requisite due process for transfer to special education classes would be fulfilled by implementation of regulations which required notice including "listing those agencies in the community from which legal counsel may be obtained for those unable to pay for counsel").

But see:

- John A. v. San Bernardino City Unified School District, 187 Cal. Rptr. 472, 654 P.2d 242, 247-48 (Cal. 1982) (expulsion; no obligation to inform student that free legal assistance available from legal aid office).

11. Notice of Availability of Diagnostic Services and Special Education Evaluation**See:**

- Mills, supra, 348 F. Supp. at 882 (D.D.C. 1972) ("Inform the child and the parent or guardian that if the child is thought by the parent or guardian to require special education services, that such child is eligible to receive, at no charge, the services of a public or private agency for a diagnostic medical, psychological or educational evaluation");
- Hairston v. Drosick, supra, 423 F. Supp. at 185 (S.D. W. Va. 1976).

See generally §III.C., "Discipline of Handicapped Students," in the Center's 1982 *School Discipline and Student Rights* manual.

12. Provision of Alternative Education During Exclusion Period

See: Mills, supra, 348 F. Supp. at 882 (D.D.C. 1972) ("describe alternative educational opportunities to be available to the child during the proposed suspension period").

13. Notice of Right to Pre-Hearing Conference

See: Jordan, supra, 583 F.2d at 98 (3d Cir. 1978) ("The notice shall inform the parent or guardian and student of his or her right to an informal meeting with the building principal and other professional staff. At such informal meeting the building principal shall furnish a copy of the procedures set forth herein and the principal shall verbally explain to the parent or guardian and student their due process rights described therein").

C. TIMING OF HEARING

A fundamental requirement of due process is 'the opportunity to be heard.' It is an opportunity which must be granted at a meaningful time and in a meaningful manner.

Armstrong v. Manzo, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191 (1965) (citation omitted).

There are competing interests in setting the time for a hearing. On one hand, either party may have an interest in speedy resolution. If the student is in school up to the time of the hearing, as should normally be the case under the prior hearing rule discussed in Chapter III.A., school officials usually will not want much delay. If the student properly has been placed on emergency suspension pending the hearing, the student (and his or her parents) will want the hearing held quickly. Assuming that the student has already had some form of preliminary hearing on the emergency suspension (see Chapter III.A.5.), the legal upper time limits on the final hearing will probably vary depending upon the extensiveness of that preliminary hearing. Once the time limits appropriate to the preliminary hearing have elapsed, the full hearing must be held or the student must be permitted to return to school. In Goss v. Lopez, *supra*, the Supreme Court held that after an emergency suspension, a hearing should be held "as soon as practicable, as the District Court indicated" (the district court had set the outer time limit for a hearing at "[n]ot later than 72 hours after the actual removal of the student..."). 419 U.S. at 582-83, 95 S.Ct. 740; *see* 372 F. Supp. at 1302. In Doe v. Rockingham County School Board, 658 F. Supp. 403, 407-08 (W.D. Va. 1987) (thirty day suspension), the court stated that the hearing should be held "within a reasonable period of time after the date of the suspension, which would not normally exceed 72 hours," and that a due process violation occurred where a hearing was not held until 29 days after the suspension was imposed.

In one case, delay in initiating a complaint against a college student was held to violate his rights. See Machosky v. State University of N.Y. at Oswego, 546 N.Y.S. 2d 513 (Sup. Ct., Oswego Cty. 1989). Here, the student was charged with making harassing phone calls to another student, with the charge made "some three months following the cessation of the phone calls...." As two university employees were "co-complainants," the delay was chargeable to the defendants. *Id.* at 516. As two persons had left the area and "were unable to appear as witnesses," the delay "resulted in a significant prejudice to the petitioner." *Id.* The court concluded that the "delay was unreasonable and an abuse of discretion." *Id.*

See generally on this issue:

- United States v. Lovasco, 431 U.S. 783, 97 S.Ct. 2044 (1977) (delay in indictment did not deny due process of law);
- Mitchell v. Board of Trustees, 625 F.2d 660, 662 n.4 (5th Cir. 1980) (where student has pre-exclusion hearing consistent with Goss requirements, he may be excluded without evidence that problem is a continuing one);

- Montoya v. Sanger Unified School District, 502 F. Supp. 209, 212-13 (E.D. Cal. 1980) (where students were first suspended for five days following informal hearings, subsequent extensions must be treated as separate, additional suspensions requiring additional hearings);
- Graham v. Knutzen, 362 F. Supp. 881, 882-83, 884-85 (D. Neb. 1973) (examples of delayed hearings; standards not consistent with Goss).

On the other hand, both parties have an interest in having adequate time to prepare for the hearing. Without specifically addressing the issue of adequate preparation time, however, the Supreme Court stated in Goss v. Lopez that for suspensions of ten days or less, in the absence of unusual circumstances (such as factual disputes), "There need be no delay between the time 'notice' is given and the time of the hearing." 419 U.S. 565, 582, 95 S.Ct. 729, 740 (1975). Cf. Hillman v. Elliot, 436 F. Supp. 812, 815-16 (W.D. Va. 1977) (three day suspension). See Cintrón v. State Board of Education, 384 F. Supp. 674, 680 (D.P.R. 1974) (suspensions for up to 5 days): "A hearing can be meaningful only if the authorities have given the accused person an opportunity to plan, prepare and present his response and the evidence in mitigation or for defense."

See Chapter II.A. on the factors which might make a short suspension "unusual." On the need for time to prepare in short suspension cases where there is a dispute, see Peter Roos, "Goss and Wood: Due Process and Student Discipline," 20 *Inequality in Education* 42, 44 (1975).

Lower courts have often recognized the student's interest in having adequate time to prepare, but the exact definition of adequate notice of the time of the hearing depends upon the nature of the particular case.

See:

- Jordan v. School District of City of Erie, 583 F.2d 91, 98 (3d Cir. 1978) (consent decree) (disciplinary transfer between six weeks and a year; parent or student must request hearing within five days of notice, and hearing shall be scheduled within three to ten days of receipt of request);
- Jones v. State Board of Education, 279 F. Supp. 190, 199 (M.D. Tenn. 1968), *aff'd*, 407 F.2d 834 (6th Cir. 1969), *cert. dismissed*, 397 U.S. 31 (1970) (indefinite suspension; two days notice prior to hearing sufficient);
- Navato v. Sletten, 560 F.2d 340, 345 and n.9 (8th Cir. 1977) (denial of certificate of completion; "some kind of prior notice");
- Esteban v. Central Missouri State College, 277 F. Supp. 649, 651 (W.D. Mo. 1967), *approved*, 415 F.2d 1077, 1089 (8th Cir. 1969), *cert. denied*, 398 U.S. 965 (1970) (as to suspension for two semesters, at least 10 days notice required);
- Nash v. Auburn University, 812 F.2d 655, 661-62 (11th Cir. 1987) (suspension for academic dishonesty; six days' notice provided adequate time to prepare);

- Doe v. Kenny, C.A. No. H-76-199 (D. Conn., Oct. 12, 1976) (consent decree, p. 3) (Clearinghouse No. 19,358C) (suspension beyond five days; student and parent must receive at least five days prior notice);
- Mills v. Board of Education of District of Columbia, 348 F. Supp. 866, 882 (D.D.C. 1972) (suspension or other exclusion from student's normal program for more than two days; hearing must be scheduled "at a time and place reasonably convenient to" parent, "within four school days of the date upon which written notice is given, and may be postponed at the request of the child's parent or guardian for no more than five additional school days where necessary for preparation");
- Behagen v. Intercollegiate Conference of Faculty Representatives, 346 F. Supp. 602, 608 (D. Minn. 1972) (suspension from basketball practices; at least 2 days notice required);
- Davis v. Mann, 721 F. Supp. 796, 803 (S.D. Miss. 1988) (academic exclusion from dental school residency program; "one week lapse of time between the presentation of the charges against Davis [at first day of hearing] and his presentation of his defense gave him sufficient opportunity..." to prepare a defense);
- Speake v. Grantham, 317 F. Supp. 1253, 1258 (S.D. Miss. 1970) (suspension; "ten days notice..., this period to commence one day subsequent to the date of mailing of the notice");
- Felder v. Board of Education, 346 F. Supp. 722, 724, 730, 731 (D. Neb. 1972) (expulsion for remainder of year; at least 3 days notice required);
- Morale v. Grigel, 422 F. Supp. 988, 1003 (D.N.H. 1976) (semester suspension; 2 days notice sufficient);
- Vail v. Board of Education, 354 F. Supp. 592, 603 (D.N.H. 1973), *remanded for further relief*, 502 F.2d 1159 (1st Cir. 1973) (exclusion beyond 5 school days; "hearing after sufficient time to prepare a defense or reply...");
- Corr v. Mattheis, 407 F. Supp. 847, 853 (D.R.I. 1976) (termination of federal financial aid; "adequate time to prepare...position between notice and hearing");
- Adibi-Sadeh v. Bee County College, 454 F. Supp. 552, 555-56 (S.D. Tex. 1978) (four days notice sufficient for this particular campus);
- Caldwell v. Cannady, No. CA-5-994 (N.D. Tex., Jan. 25, 1972) (Mem. Opin., p. 4) (Clearinghouse No. 7,424) (expulsion for remainder of semester; "...notice...and a complete hearing after the student has had a reasonable time to prepare his defense");
- Sullivan v. Houston Independent School District, 307 F. Supp. 1328, 1343 (S.D. Tex. 1969) ("suspension for a substantial period of time"; "...ample time before the hearing to examine the charges, prepare a defense and gather evidence and witnesses");
- Gratton v. Winoski School District, C.A. No. 74-86 (D. Vt., Apr. 10, 1974) (Preliminary Injunction, p. 5) (Clearinghouse No. 45,539) (indefinite

suspension; "...a sufficient period prior to the hearing to examine [written notice of the charges]");

- Marzette v. McPhee, 294 F. Supp. 562, 567 (W.D. Wis. 1968) ("suspension or expulsion"; 10 days notice required);
- Stratton v. Wenona Community Unit District No. 1, 551 N.E.2d 640 (Ill. 1990) (expulsion; two days written notice adequate where "both parents and Anthony were well aware of the instances of...misconduct leading up to the expulsion."; the court viewed as ameliorative factors that "[a] summary of evidence to be presented was given the Strattons upon their arrival at the hearing" and they were offered a continuance "if they agreed to a continuation of Anthony's suspension...pending a new hearing date");
- Barletta v. State University Medical Center, 533 So. 2d 1037, 1040 (La. App. 1988) (expulsion from dental school; "Further, given appellant's familiarity with the charges brought against him by the committee, notice one week prior to the hearing was sufficient time for him to obtain alternate representation if he so desired.");
- Machosky v. State University of New York at Oswego, *supra*, 546 N.Y.S. 2d at 515-16 (Sup. Ct., Oswego Cty., N.Y. 1989) (failure to adjourn hearing to allow student to secure an advisor "was an abuse of discretion"; student had made "a good-faith effort" to secure an advisor and it "does not appear that any prejudice would have occurred to the university...");
- Carey v. Savino, 91 Misc. 2d 50, 397 N.Y.S.2d 311, (N.Y. Sup. Ct. 1977) (permanent expulsion; 21 hours insufficient where student had a statutory right to counsel; shortness of notice denied "adequate opportunity" to secure counsel);
- Sofair v. State University of New York, 388 N.Y.S. 2d 453, 458 (N.Y. App. 1976) (academic dismissal; detailed written notice of evidence and "an opportunity for an informal hearing after reasonable time to prepare for it").

Cf.:

- Hairston v. Drosick, 423 F. Supp. 180, 185 (S.D. W. Va. 1976) (placement in special classes; requisite due process would be afforded by implementing regulations which provide at least 15 days prior notice).
- Farley v. Board of Education of Mingo County, 365 S.E. 2d 816 (W.Va. 1988) (where board sought to discharge two teachers as unneeded, written notice of hearing to be held on March 27, received on March 25 and March 26, was "unreasonable as it deprived the teachers of any opportunity to challenge the bases for their proposed dismissals"; court interpreted statute in light of constitutional principles).

Compare:

- Bleicker v. Board of Trustees, 485 F. Supp. 1381, 1388 (S.D. Ohio 1980) (student failed to suggest how lengthier notice could have resulted in more effective presentation of her case);

- Kirtley v. Armentrout, 405 F. Supp. 575, 577-78 (W.D. Va. 1975) (3 day suspension; notification of the standard to be used on appeal adequate when provided at the appeal hearing itself where student had more than one month's notice of the appeal hearing, student was referred more than a month previously to regulations which stated that this standard would be used, and student did not object to use of this standard at the hearing).

Again, the student's right to adequate preparation time must be implemented in a way which does not interfere with his or her right to a prior hearing (see Chapter III.A.), either by remaining in school pending the hearing or by receiving an adequate preliminary hearing to cover the interim period (including, where appropriate, adequate time to prepare for the interim hearing).

For discussion of cases addressing the timing of a disciplinary hearing when factually-related juvenile or criminal proceedings are pending against a student, see Chapter III.F.6.(e.).

D. ACCESS TO EVIDENCE BEFORE THE HEARING

Some courts have ruled that *the notice* of the hearing and the charges should contain notice of the evidence against the student. Summaries of relevant decisions appear in Chapter III.B.7.(c.) "Notice" - "Nature of Evidence and List of Witnesses."

Some courts have ruled that students must be given *access in advance* to affidavits and exhibits which will be used against them.

See:

- Jordan v. School District of City of Erie, 583 F.2d 91, 98, 99 (3d Cir. 1978) (consent decree) (disciplinary transfers of six weeks to a year; "the student's school records, any tests or reports upon which said transfer is proposed");
- Esteban v. Central Missouri State College, 277 F. Supp. 649, 651 (W.D. Mo. 1967), *approved*, 415 F.2d 1077, 1089 (8th Cir. 1969), *cert. denied*, 398 U.S. 965 (1970) (suspension for two semesters);
- Mills v. Board of Education, 348 F. Supp. 866, 882 (D.D.C. 1972) (suspension, transfer or other exclusion from student's normal program for more than two days);
- Speake v. Grantham, 317 F. Supp. 1253, 1258 (S.D. Miss. 1970) (indefinite suspension) (see below);
- Gratton v. Winooski School District, C.A. No. 74-86 (D. Vt., Apr. 10, 1974) (Preliminary Injunction, p. 5) (Clearinghouse No. 45,539) (indefinite

suspension; copies of any written reports to be sent to student at least five days before hearing);

- Marzette v. McPhee, 294 F. Supp. 562, 567 (W.D. Wis. 1968) ("suspension or expulsion").

See also:

- Ross v. Disare, 500 F. Supp. 928, 934 (S.D.N.Y. 1977) (suspension beyond 5 days; admission of written statements and anecdotal record without prior notice violates state law).

Cf.:

- Wasson v. Trowbridge, 382 F.2d 807, 813 (2d Cir. 1967) (dismissal from merchant marine academy; not necessarily entitled to see "confidential opinions of members of the faculty," although there should be an "evidentiary hearing into the nature of the concealed evidence, if any, and the reason for withholding it");
- Davis v. Mann, 721 F. Supp. 796, 802 (S.D. Miss. 1988) (academic dismissal from dental school residency program; "...court is aware of no authority that in a student disciplinary process the school is required to give the student notice of evidence favorable to him"; "most of the comments" were "unfavorable"; no substantial prejudice shown);
- Board of Education v. Butcher, 61 A.D.2d 1011, 402 N.Y.S.2d 626 (N.Y. App. Div. 1978) (teacher disciplinary proceeding; right to prepare defense required access to entire records of his students, with all identifying data deleted).

Some courts have held that the student is entitled to a list of witnesses and a summary of their testimony in advance.

See:

- Jordan, *supra*, 583 F.2d at 98 (3d Cir. 1978) (consent decree) (disciplinary transfers; names of all persons who will give relevant information);
- Williams v. Dade County School Board, *supra*, 441 F.2d at 302 (5th Cir. 1971) ("the names of witnesses with a summary of their testimony");
- Dixon v. Alabama State Board of Education, *supra*, 294 F. 2d at 159 (5th Cir. 1961) (expulsion; "...the names of the witnesses... and an oral or written report on the facts to which each witness testifies");
- Speake v. Grantham, *supra*, 317 F. Supp. 1253, 1257, 1258 (S.D. Miss. 1970) (denial of due process because students "were not given names of witnesses who would testify against them," other than one, and "were not furnished with copies of statements of witnesses who were to testify"; any further action must be based on hearing procedures in which students

"shall be informed of the names and addresses of all witnesses to be called by the University and furnished a statement consisting of the substance of potential witness' testimony at least five (5) days prior to the hearing, as well as copies of any other documentary evidence which will be introduced");

- Graham v. Knutzen, 362 F. Supp. 881, 885 (D. Neb. 1973) (all suspensions; students and parents must be notified of "names of teachers and administrators having primary knowledge of the facts");
- Behagen v. Intercollegiate Conference of Faculty Representatives, 346 F. Supp. 602, 608 (D. Minn. 1972) (suspension from basketball practices; list of witnesses);
- Tully v. Orr, 608 F. Supp. 1222, 1226 (E.D. N.Y. 1985) (disenrollment from Air Force Academy in final semester; student not given notice of two of 19 witnesses whose testimony "was quite brief"; no due process violation);
- Bobbi Jean M. v. Wyoming Valley West School District, C.A. No. 79-576 (M.D. Pa., Nov. 3, 1980) (Consent Decree, p. "SAMPLE NOTICE") (Clearinghouse No. 30,528B);
- Bistrick v. University of South Carolina, 324 F. Supp. 942, 950 (D.S.C. 1971) (indefinite suspension; both names and content);
- Caldwell v. Cannady, No. CA-5-994 (N.D. Tex., Jan. 25, 1972) (Mem. Opin., p. 5) (Clearinghouse No. 7,424) (expulsion for remainder of semester; list of names and summary of testimony).

To the extent that the evidence, statements, and names of witnesses are in writing, the parent's or eligible student's right to inspect is grounded not only in the due process clause, but also in the Family Educational Rights and Privacy Act of 1974, 20 U.S.C. §1232g, governing student records in educational institutions receiving federal education funds, since the evidence would then be a "student record," of the student subject to discipline. See 34 C.F.R. §99.3 (definition of "education records") and §XII.A., "Student Records" of the Center's 1982 manual *School Discipline and Student Rights*.

For the right to confront and cross-examine at the hearing those persons who have made statements against the student, see Chapter III.F.4., "Adverse Witnesses and Evidence."

E. IMPARTIAL DECISIONMAKER

1. Introduction

Courts have uniformly recognized the student's right to an impartial decisionmaker.^{*} Nevertheless, it has often been found that the student in the particular case has not demonstrated sufficient evidence of partiality.

It is helpful to begin with decisions reflecting general principles in this area. In Withrow v. Larkin, 421 U.S. 35, 95 S.Ct. 1456 (1975), the Court addressed a Wisconsin statutory scheme authorizing a medical examining board to investigate, in a non-adversary hearing, a doctor's compliance with certain standards, to make charges--if deemed appropriate, and then to adjudicate the charges following a contested hearing. The Court reversed a decision finding a procedural due process violation. It concluded generally that "[t]he processes utilized by the Board...[did] not in themselves contain an unacceptable risk of bias." *Id.*, at 54-55, 1468; emphasis added. There was "[n]o specific foundation...for suspecting that the Board had been prejudiced by its investigation or would be disabled from hearing and deciding on the basis of the evidence to be presented at the contested hearing." *Id.*, at 55, 1468; emphasis added.

Other language of Withrow serves to identify the theoretical framework applicable in resolving issues of partiality. First, the Court notes that "various situations have been identified in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." *Id.*, at 47, 1464; emphasis added. Examples include the adjudicator with "a pecuniary interest in the outcome," or who "has been the target of personal abuse or criticism from the party before him." *Id.*, footnotes omitted. Second, it stated that plaintiff "must convince that, under a realistic appraisal of psychological tendencies and human weakness, conferring investigative and adjudicative powers on the same individuals poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented." *Id.*; emphasis added.

In In Re Murchinson, 349 U.S. 133, 75 S.Ct. 623 (1955), the Court addressed a system under which a Michigan judge first functioned as a "one-man judge grand jury" and then held two witnesses in contempt, "call[ing] on" his personal knowledge of their conduct. General principles also emerge from the following excerpt from the Murchinson opinion (349 U.S. at 136, 75 S.Ct. at 625):

A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can

^{*} See, e.g., Gorman v. University of Rhode Island, 837 F.2d 7, 15 (1st Cir. 1988) (long-term suspension); Wasson v. Trowbridge, 382 F.2d 807, 813 (2d Cir. 1976) (dismissal from Merchant Marine Academy); Nash v. Auburn University, 812 F.2d 655, 665 (11th Cir. 1987) (long-term suspensions for cheating).

be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that 'Every procedure which would offer a possible temptation to the average man as a judge * * * not to hold the balance nice, clear, and true between the State and the accused denies the latter due process of law.' Tumey v. State of Ohio, 273 U.S. 510, 532, 47 S.Ct. 437, 444, 71 L.Ed. 749. Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way 'justice must satisfy the appearance of justice.' Offutt v. United States, 348 U.S. 11, 14, 75 S.Ct. 11, 13.

In summary, the focus is on (1) evidence of actual bias or prejudice and (2), taking account of human nature, circumstances establishing "too high" a probability, an "unacceptable risk," that the decisionmaker will be "disabled from hearing and deciding on the basis of the evidence...", or "possibl[y] tempt[ed]...not to hold the balance nice, clear and true..." between the parties. These are vague standards, accounting, in part, for the inconsistent pattern of decisions. In addition, it is questionable that courts are making "a realistic appraisal of psychological tendencies and human weakness..." or "possible temptation."

The decisions in the area of student discipline concern four broad areas.

- First, there are structural issues. These arise, for example where a superintendent is required to judge a dispute between a student/parent and a principal, or a principal or assistant principal to evaluate the competing claims of student/parent and a teacher. The very nature of the administrator's role, operating within a hierarchical chain of command in which success depends upon good working relationships, creates inevitable pressures not to issue too many decisions against colleagues. However, an argument to prove this phenomenon should be heavily buttressed by testimony of expert, student, parent and staff witnesses.
- Second, the decisionmaker may have had prior involvement in the incident as an alleged victim of misconduct or as a witness. A related claim is that the decisionmaker has prior knowledge of pertinent events.
- Third, an individual may have more than one role in the discipline process. Possible roles include as investigator, "prosecutor," advisor to the decisionmaker, decisionmaker, or "appellate" decisionmaker.
- Fourth, there may be questions of prejudgment, or other actual or overt bias of the decisionmaker against the student.

These areas are discussed in order.

2. Structural Issues

As one court noted, "It is well settled that there is no constitutional right to be heard by a particular tribunal." Sill v. Pennsylvania State University, 462 F.2d 463, 469 (3rd Cir. 1972). Further, "[a] student's right to be heard does not necessarily extend to an appearance before the ultimate authority in the disciplinary process." Sohmer v. Kinnard, 535 F. Supp. 50, 54 (D. Md. 1982) (dismissal from pharmacy school). Thus, while courts will in some circumstances rule that certain persons cannot be decisionmakers, they will rarely spell out who should be the decisionmaker.

One exception is Mills v. Board of Education, 348 F. Supp. 866, 883 (D.D.C. 1972) (suspension, transfer, or other exclusion from student's normal program for more than two days), in which the court mandated "independent hearing officers," who "shall be an employee of the District of Columbia, but shall not be an officer, employee or agent of the Public School System."

Particular tribunals may also be established by consent orders. For example, the consent decree approved in Jordan v. School District of City of Erie, 583 F.2d 91, 98, 99 (3rd Cir. 1978) (disciplinary transfers of six weeks to a year), provides for a first level hearing

before an At-Large Committee composed of one administrator and two employees of the School District selected by the Erie Education Association. None of the members of this At-Large Committee shall be from the student's school building. The members of the At-Large Committee shall serve on a rotating basis.

A second-level, *de novo* hearing would be held before an impartial hearing examiner.

The impartial hearing examiner at Hearing II shall be a representative of either the Bureau of Mediation or the American Arbitration Association. Such hearing examiner shall be paid by the School District. The hearing examiner shall be selected from a list of five (5) members, the School District striking one name and the parent or guardian and student or his/her representative striking the next, and continuing in like manner until one name remains.

See also 583 F.2d at 96-97 (removal from a class).

A few other courts have recognized that the very role of an administrator may make him/her an inappropriate officer.

- PUSH v. Carey, C.A. Nos. 73-C-2522, 74-C-303 (N.D. Ill., Nov. 15, 1975) (Mem. Opin. and Order, p. 9) (Clearinghouse No. 17,507) (suspensions which potentially exceeded 10 days; "...in some instances, a school administrator not from the same school as the accused student would be necessary"), *rev'd in part on other grounds*, 545 F.2d 30 (7th Cir. 1976) (reversed because of lower court's failure to award damages to students).

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rev'd on other grounds *sub nom.* Carey v. Piphus, 435 U.S. 247, 98 S.Ct. 1042 (1978) (reversed on damage issue);

- Quintanilla v. Carey, Civ. No. 75-C-829 (N.D. Ill., Mar. 31, 1975) (Mem. Opin. and Order, p. 6) (Clearinghouse No. 15,369A) (permanent expulsion; "None of the administrators of Kelyvn Park High School shall serve as hearing officers; the Board shall appoint a permanent hearing officer.");
- Everett v. Marcase, 426 F. Supp. 397, 402 (E.D. Pa. 1977) (transfers; "The hearing officer should not, of course, be the principal of the school who holds the first informal hearing and recommends the transfer. Likewise, it obviously should not be someone under his direct control or supervision or below him in the 'chain of command';" principal's superior may serve as hearing officer).

Recognition of this phenomenon can create a demand either for independent hearing officers, such as those mandated in Mills and at the second level hearing in Jordan, or for student courts or student-staff panels, which are used by some districts. Full and active student participation is critical for addressing issues of discipline and student rights. Cf. Nitzberg v. Parks, 525 F.2d 378, 385 (4th Cir. 1975). It should be cautioned, however, that placing students on hearing panels is often the easiest step, in political terms, toward student involvement in decision-making. School systems that are otherwise unwilling to allow students a real role in decisions will sometimes do so in this area. It may well be meaningless to place students on a hearing panel in the absence of other forms of substantial student involvement in decisions, since they are then being told to enforce rules which they have had no role in shaping.

Recognition of the impartiality problems raised when administrators serve as hearing officers may be found in the Education for All Handicapped Children Act, 20 U.S.C. §1415(b)(2), which declares that "no hearing conducted pursuant to the requirements of this paragraph [i.e., special education hearings] shall be conducted by an employee of such agency or unit involved in the education or care of the child." See also 34 C.F.R. §300.507 (the implementing regulations); and Department of Education, "Nondiscrimination in Federally Assisted Programs: Policy Interpretation No. 6," 43 Fed. Reg. 36034 (Aug. 14, 1978) (school board members may not serve as special education hearing officers).

See (for example):

- Muth v. Central Bucks School District, 839 F.2d 113, 122-24 (3rd Cir. 1988) (Pennsylvania secretary of education may not review decision of hearing officer), reversed as to other issues *sub nom.* Dellmuth v. Muth, 109 S.Ct. 2397 (1989);
- Grymes v. Madden, 672 F.2d 321, 323 (3rd Cir. 1982) (employee of state department of education may not serve as hearing officer);
- Helms v. McDaniel, 657 F.2d 800, 806 n.9 (5th Cir. 1981) (state education agency may not make the decision);

- Robert M. v. Benton, 634 F.2d 1139 (8th Cir. 1980) (state superintendent of education may not serve as special education hearing officer);
- Mayson v. Teague, 749 F.2d 652 (11th Cir. 1984) (superintendents, assistant superintendents, and other employees of Alabama public school systems, and employees of the university system of the state who have "participated in the formulation of regulations and policies of the State affecting handicapped children" may not serve as hearing officers).

It is to be noted, however, that these decisions interpreted statutory and regulatory language. The courts did not consider whether these results were compelled by constitutional due process standards.

Students have, however, generally failed in their attempts to argue that hearing officers or panels consisting solely of administrators or of persons employed and appointed by the administration are by their very nature biased. See especially Graham v. Knutzen, 351 F. Supp. 642, 669 (D. Neb. 1972) (suspensions for extended periods).

See:

- Winnick v. Manning, 460 F.2d 545, 548-49 (2nd Cir. 1972); (suspension from university for a semester);
- Jenkins v. Louisiana State Board of Education, 506 F.2d 992, 1003 (5th Cir. 1975) (suspension);
- Murray v. Baton Rouge Parish School Board, 472 F.2d 438, 443 (5th Cir. 1973) (suspension);
- Hillman v. Elliot, 436 F. Supp. 812, 816 (W.D. Va. 1977) (three-day suspension);
- John A. v. San Bernardino City Unified School District, 33 Cal. 301, 654 P.2d 242, 187 Cal. Rptr. 472 (Cal. 1982) (expulsion; not a violation of due process to have teachers sitting as fact finders);
- Rucker v. Colonial School District, 517 A.2d 703, 705 (Del. Super. Ct. 1986) (expulsion; no right to a hearing officer who is not an employee of the school district, only to a fair and impartial hearing officer).

3. Prior Involvement of the Decisionmaker in the Incident in Question

One situation in which there is an unacceptable risk of bias is where the decisionmaker "has been the target of personal abuse or criticism from the party before him." Withrow v. Larkin, *supra*, 421 U.S. at 47, 95 S.Ct. at 1464; footnote omitted. The cases cited as illustrative of this proposition include Taylor v. Hayes, 418 U.S. 488, 501, 94 S.Ct. 2697, 2705 (1974) and Mayberry v. Pennsylvania, 400

U.S. 455, 91 S.Ct. 499 (1971). In Taylor, a trial judge, after trial, found a lawyer guilty of contempt for his conduct during trial and imposed a jail sentence. The record reflected that the judge "[became] embroiled in a running controversy with [the lawyer]." 418 U.S. at 501, 94 S.Ct. 2705. In Mayberry, similarly, a criminal defendant was, after trial, determined to be guilty of contempt by the trial judge and given a long prison sentence. Here, the record revealed that the judge "was the target of petitioner's insolence." 400 U.S. at 465, 92 S.Ct. at 505. See also Pickering v. Board of Education, 391 U.S. 563, 578 n.2 (1968).

Students prevailed in two instances where the decisionmaker was allegedly the victim of the student's misconduct:

- Sullivan v. Houston Independent School District, 475 F.2d 1071, 1077 (5th Cir. 1973) (suspension for remainder of semester; where "the incidents for which Paul was suspended were cast largely in terms of a personal confrontation with Mr. Cotton" "It is difficult to imagine that Mr. Cotton could have given Paul an impartial hearing");
- Williams v. Austin Independent School District, C.A. No. A-78-CA-215 (W.D. Tex., Aug. 26, 1981) (Mem. Opin. and Order, p. 5) (Clearinghouse No. 32,431A) (suspension for remainder of quarter; violation of due process where two witnesses who were members of the panel that recommended student's punishment were allegedly struck by him, creating "the probability of bias").

Compare:

- Hortonville Joint School District No. 1 v. Hortonville Education Association, 426 U.S. 482, 495, 96 S.Ct. 2308, 2315 (1976) (dismissal by school board of teachers who engaged in admittedly unlawful strike; the Court viewed this decision as "only incidentally a disciplinary decision; it had significant governmental and public policy dimensions as well").

Similarly, three courts took the view that a person should not be both accuser and decisionmaker:

- Push v. Carey, C.A. Nos. 73-C-2522, 74-C-303 (N.D. Ill., Nov. 15, 1975) (Mem. Opin. and Order, pp. 9-10) (Clearinghouse No. 17,507) (suspensions which potentially exceeded 10 days; decisions to suspend made, improperly, "by their major factual accusers"; witness should not be a hearing officer) (subsequent history omitted);
- Bradley v. Milliken, C.A. No. 35257 (E.D. Mich., July 3, 1975) ("When the principal is involved in the accusation process, another person must replace the principal to conduct the hearing");
- Warren v. National Association of Secondary School Principals, 375 F. Supp. 1043, 1047 (N.D. Tex. 1974) (dismissal from honor society; hearing defective where accusing witness was on the hearing panel).

See also:

- Gratton v. Winooski School District Board of Education, C.A. No. 74-86 (D. Vt. April 10, 1974) (Preliminary Injunction, p. 4) (Clearinghouse No. 45,539) ("strong likelihood" that principal or superintendent may be "witnesses at the hearing" of student facing long-term suspension a factor supporting holding that neither would be an impartial decisionmaker).

But see:

- Gorman v. University of Rhode Island, *supra*, 837 F.2d at 10, 15 (1st Cir. 1988) (University employee served as "advisor to Board," "participated in its meetings as a non-voting member", and, in one instance, was "a witness" [subject of testimony not provided]; no evidence "fair hearing" denied due to these "multiple roles"; "In the intimate setting of a college or university, prior contact between the participants is likely, and does not *per se* indicate bias or partiality.");
- Brewer v. Austin Independent School District, 779 F.2d 260, 261, 264 (5th Cir. 1985) (eight week suspension; assistant principal investigated drug charges against student, found drugs and drug paraphernalia in search of student, testified against student at campus Review Board hearing, and served as Board member; no evidence assistant was "actually biased").
- Lamb v. Panhandle Community Unit School District No. 2, 826 F.2d 526, 529-30 (7th Cir. 1987) (three-day suspension and missing of final exams; superintendent and principal, who testified against Lamb, attended school board's closed deliberations, although student "ha[d] no idea of what transpired..."; no evidence of "actual bias," or "impermissible risk" of bias).

Note: Brewer fails to consider that not only actual bias, but also procedures with too great a risk of bias are improper.

The right to an impartial tribunal is in some circumstances linked to certain other basic rights, including the student's right of access to evidence (Chapter III.D.), to confront and cross-examine all witnesses whose testimony is considered (Chapter III.F.4.), to a presumption of innocence (Chapter III.F.7.), to a hearing confined to the scope of the charges in the initial notice (Chapter III.F.8.(b.)), and to a decision based solely on the evidence presented at the hearing (Chapter III.G.1). See, for example, In re DeVore, *supra*, 11 Ed. Dept. Rep. 296, 298 (N.Y. Educ. Comm'r 1972):

The superintendent chose ... to rely upon his personal knowledge of the fact of arrest and the basis for the arrest. It is evident from a reading of the transcript that he utilized such personal knowledge as an alternative to testimony. There are, of course, three essential defects in this procedure.

First, a decision to impose a disciplinary penalty and the extent of the penalty must be supported by the evidence contained in the record. This cannot be the case where the fact of arrest is established solely from the private knowledge of the hearing officer. Secondly, it is impossible for

the student to cross-examine or in any way rebut the private, non-testimonial knowledge of the hearing officer. Third, and perhaps most serious, is the fact that the hearing officer loses his neutral posture and, in effect, becomes a silent witness in support of the charges. Nothing is more essential than a neutral hearing officer.

See also:

- In Re Murchinson, 349 U.S. 133, 138, 75 S.Ct. 623, 626 (1955) (Michigan judge functioning as "one-man grand jury" found two witnesses guilty of contempt. "Thus the judge whom due process requires to be impartial in weighing the evidence presented before him, called on his own personal knowledge and impression of what had occurred in the grand jury room and his judgment was based in part on this impression, the accuracy of which could not be tested by adequate cross-examination.");
- Winnick v. Manning, *supra*, 460 F.2d at 548 (2d Cir. 1972) (suspension from university for a semester; no evidence that decisionmaker "observed, investigated or made any prehearing decisions about Winnick's conduct..."; emphasis added).

In Goss v. Lopez, addressing procedures for suspensions of up to 10 days, the Court wrote (419 U.S. at 584, 95 S.Ct. at 741):

Requiring that there be at least an informal give-and-take between student and disciplinarian, preferably prior to the suspension, will add little to the factfinding function where the disciplinarian himself has witnessed the conduct forming the basis for the charge. But things are not always as they seem to be, and the student will at least have the opportunity to characterize his conduct and put it in what he deems the proper context.

Thus, the Court approved, in the case of a short suspension, reliance on personal knowledge, with the stipulation that the decisionmaker be open to another view. (The facts in the Goss case included instances where misconduct occurred "in the presence of the school administrator who ordered the suspension." See 419 U.S. at 569-70, 95 S.Ct. 734.)

See also:

- Hortonville Education Association v. Hortonville Joint School District, *supra*, 426 U.S. at 491-94, 96 S.Ct. at 2313-14 (dismissal of striking teachers by school board which previously had been involved in negotiating issues leading to the strike; some familiarity with the facts of the case gained by an agency in performance of its statutory duties does not disqualify it as a decision-maker; no evidence of actual bias);
- Schaill v. Tippecanoe County School Corporation, 864 F.2d 1309, 1323-24 (7th Cir. 1988) (review of positive drug test result; "...Goss specifically

contemplated that a school official with personal knowledge might serve as the hearing officer...");

- Nash v. Auburn University, *supra*, 812 F.2d at 666 (11th Cir. 1987) (student justice had "knowledge of the suspicions" about students subjected to lengthy suspensions and had advised some students how to make complaints of violation of the code against them; neither factor "appear[s] to have rendered him a biased decisionmaker or to have denied appellants a tribunal free of bias");
- Gonzales v. McEuen, 435 F. Supp. 460, 464 (C.D. Cal. 1977) (expulsion for remainder of year; review of some evidence by school board before hearing did not require members' disqualification).

It is doubtful that all of the decisions in this section are consistent, or correctly decided. Where the decisionmaker and victim are one, the result seems clear. "[N]o [person] can be a judge in his[/her] own case...." In Re Murchinson, *supra*, 349 U.S. at 136, 75 S.Ct. at 625. Where an official is "the major factual accuser" or a major accuser (rather than one who merely states that a hearing will be held on an accusation made by others), the result should be equally clear. Is the decisionmaker, based upon personal observation, to take the position "you violated this rule," and then stand back, neutrally, and decide whether other evidence outweighs his/her own view? The decisionmaker has assumed an adversary posture to the student, which, in view of "a realistic appraisal of psychological tendencies and human weaknesses" creates "an unacceptable risk of bias." Withrow v. Larkin, *supra*.

The problems and arguments are about the same if the decisionmaker is known to have observed events in question, but is not an accuser or formal witness. Of course, if an adjudicator relies upon personal observation, without mentioning this fact, the problem is even more severe. Yet, Goss renders these situations ambiguous. Two arguments are available to the student and his or her advocate. Goss indicates that the administrator must remain flexible. The administrator should not emphasize his or her personal knowledge, excluding real consideration of other facts. Second, the Goss procedure should be allowed only in the case of the usual short suspension where Goss struck the balance in favor of informality. Compare Sections A. and B. of Chapter II of this manual. General knowledge of a situation is unlikely to be a basis for disqualifying a person. Nash v. Auburn University, *supra*.

4. Multiple Roles in the Discipline Process

The danger in multiple roles is that an individual has already taken a particular position on *the very question* currently to be decided. This may not be the case in all situations. For example, an investigator may have gathered facts without reaching a conclusion. While one may disagree with the holding of Withrow v. Larkin, *supra*, the Court did note that standards differed at the separate points where the medical board acted. ("Indeed, just as there is no logical inconsistency between a finding of probable cause and an acquittal in a criminal

proceeding, there is no incompatibility between the agency filing a complaint based on probable cause and a subsequent decision, when all the evidence is in, that there has been no violation of the statute." See 421 U.S. at 57, 95 S.Ct. at 1469.)

(a.) See generally:

- Jenkins v. Louisiana State Board of Education, *supra*, 506 F.2d at 1003 (5th Cir. 1975) (suspension; board imposed discipline in initial hearing which district court held to be defective; Board's participation in initial hearing and the members' appointment by the college president were not sufficient to establish that in the second hearing they "must have been partial to the college's position");
- Newsome v. Batavia Local School District, 842 F.2d 920, 926-27 (6th Cir. 1988) (expulsion for remainder of semester for drug-related violation; principal recounted student accusations at superintendent's hearing; superintendent privately interviewed accusers and expelled student after he and principal "adjourned to discuss the disposition of the case"; principal and superintendent "led off the [school board appeal] hearing by recounting the statements of the two accusing students;" "...school board, together with the principal and superintendent, reviewed [privately] the evidence in the case," following which the Board expelled the student; "...as a general matter, it is [not] a violation of due process for investigating administrators to participate in the deliberation process").

Note: In Newsome, the administrators not only investigated, but also were witnesses or prosecutors and decisionmakers.

- Nash v. Auburn University, *supra*, 812 F.2d at 666 (11th Cir. 1987) (student justice had "knowledge of the suspicions" about students subjected to lengthy suspensions and had advised some students how to make complaints of violation of the code against them; neither factor "appear[s] to have rendered him a biased decisionmaker or to have denied appellants a tribunal free of bias");
- Marin v. University of Puerto Rico, 377 F. Supp. 613, 623 (D.P.R. 1974) (suspension for more than one year; in outlining procedures generally applicable, court includes right to hearing before "impartial, previously uninvolved official");
- Caldwell v. Cannady, 340 F. Supp. 835, 839 (N.D. Tex. 1972) (expulsion for remainder of semester: "For the board to act as investigator, prosecutor, judge and jury makes a mockery of the notion of a fair hearing").

(b.) Earlier Participation in the Investigation

See:

- Winnick v. Manning, *supra*, 460 F.2d at 548 (2d Cir. 1972) (suspension from university for a semester; no evidence that decisionmaker "observed, investigated or made any prehearing decisions about Winnick's conduct..."; emphasis added);

- Wasson v. Trowbridge, *supra*, 382 F.2d at 813 (2d Cir. 1976) (dismissal from maritime academy; allegation that panel "had *participated in the investigation...*"; "prior official involvement in a case renders impartiality most difficult to maintain;" "Wasson was entitled to show that members of the panel had had such prior contact with his case that they could be presumed to have been biased"; emphasis added);
- Brewer v. Austin Independent School District, *supra*, 779 F.2d at 261, 264 (5th Cir. 1985) (eight week suspension; assistant principal *investigated* drug charges against student, found drugs and drug paraphernalia in search of student, testified against student at Campus Review Board hearing, and served as Board member; no evidence assistant was "actually biased"; emphasis added);
- Gratton v. Winooski School District, C.A. No. 74-86 (D. Vt., Apr. 10, 1974) (Preliminary Injunction, p. 4) (Clearinghouse No. 45,539) (indefinite suspension; particular facts here justified court's ordering that principal and superintendent previously involved in "*gathering facts and making recommendations*" not conduct hearing; not to be construed as impugning their "motives or good faith"; emphasis added);
- Schank v. Hegele, 521 N.E. 2d 9, 11 (Ohio Com. Pl. 1987) (expulsion; combining investigative and adjudicatory functions not, *per se*, a due process violation).

(c.) Combining the Roles of "Prosecutor" and Advisor

Many decisions involving students and teachers concern situations where a lawyer "prosecuted" the case and then advised the decisionmaker. In these instances, the danger of unfairness stemmed not from dual functions of the adjudicator, but in another part of the process which might well have an impact on the adjudicator. The decisions, which reach inconsistent results, are separated by category, *i.e.*, cases involving students and staff.

Students

- Tasby v. Estes, 643 F.2d 1103, 1106 (5th Cir. 1981) (disciplinary exclusions for serious offenses; "If the student is represented by a lawyer, the district's attorney ["presents the evidence against the student"] and advises the Board on the law."; "...the involvement of the school district's attorney in the disciplinary proceedings does not necessarily endanger the impartiality and integrity of the fact-finding process");
- Lamb v. Panhandle Community Unit School District No. 2, *supra*, 826 F.2d at 529-30 (7th Cir. 1987) (three-day suspension and missing of final exams; school board attorney served as prosecutor and advisor to board during its "closed-session deliberations"; superintendent and principal, who testified against Lamb, also attended these deliberations; neither "a *per se* facially unacceptable risk of bias," nor evidence of actual bias);

- Gonzales v. McEuen, *supra*, 435 F. Supp. at 464-66 (C.D. Cal. 1977) (expulsion for remainder of year; hearing defective where school district attorneys mixed roles of prosecuting the case and advising the board which heard the case, and where superintendent, who also was involved in prosecution of the case, sat with the board during its deliberations; "Whether he did or did not participate, his presence to some extent might operate as an inhibiting restraint upon the freedom of action and expression of the Board");
- Carey v. Savino, 91 Misc.2d 50, 397 N.Y.S.2d 311 (N.Y. Sup. Ct. 1977) (expulsion; "While the conduct of respondents' attorney at the hearing was probably within the guidelines of due process, at least for the appearance of fairness, it would have been more proper to aid the hearing officer only when requested to do so, and also not to be present during the deliberations of the board");
- Pittsburgh Board of Public Education v. M.J.N., 105 Pa. Commw. 397, 407, 524 A.2d 1385, 1389 (Pa. Commw. Ct. 1987) (thirty day suspension; student deprived of due process by impermissible commingling of advisory and prosecutorial functions by two lawyer staff; "despite the practicalities involved, when the legal staff of a public agency consists of two attorneys, one which supervises the other, and while one acts in his customary capacity as advisor to the Board and the other acts as prosecutor, impermissible commingling has occurred");
- Beaver v. Ortenzi, 105 Pa. Commw. 361, 524 A.2d 1022 (Pa. Commw. Ct. 1987) (court receptive to claim of improper commingling of "prosecutorial and adjudicatory" functions by college hearing panel; however, student's penalty of "suspended suspension" did not rise to level of a constitutional deprivation).

Staff

- DeKoevend v. Board of Education of West End School, 688 P.2d 219 (Colo. 1984) (teacher dismissal; impartiality of board defeated by presence of school superintendent and principal during deliberations);
- Board of Education of Arapahoe County v. Lockhart, 687 P.2d 1306, 1308-09 (Colo. 1984) (teacher dismissal; board may not hear statement from school attorney during deliberations, while excluding teacher's attorney; "violat[ion] of basic standards of fairness in an administrative adjudication");
- McIntyre v. Tucker, 490 So. 2d 1012 (Fla. Dist. Ct. App. 1986) (teacher's employment terminated; school board attorney may not act simultaneously as prosecutor and legal advisor; "In practice, impartiality and zealous representation are inherently incompatible in the same person at the same time");
- Plymouth-Canton Community School District v. State Tenure Commission, 419 N.W.2d 783, 785 (Mich. Ct. App. 1988) (teacher dismissal; where hearing officer and school board representative are members of the same law firm, there is no per se violation of due process; "To succeed with a due process challenge, a tenured teacher must show actual bias in the proceedings or a risk or probability of unfairness that is too high to be constitutionally tolerable");

- Steffen v. Board of Directors, 32 Pa. Commw. 187, 377 A.2d 1381 (Pa. Commw. Ct. 1977) (teacher dismissal; school board properly kept prosecutorial and judicial functions separate by use of two attorneys).

(d.) Decisionmaker at More Than One Point in Process

"[W]hen review of an initial decision is mandated, the decisionmaker must be other than the one who made the decision under review." Withrow v. Larkin, *supra*, 421 U.S. at 58, n. 25 (dictum); Goldberg v. Kelley, 397 U.S. 254, 271, 90 S.Ct. 1011, 1022 (1970) ("We agree with the District Court that prior involvement in some aspects of a case will not necessarily bar a welfare official from acting as a decision maker. He should not, however, have participated in making the determination under review.").

See:

- Jenkins v. Louisiana State Board of Education, *supra*, 506 F.2d at 1003 (5th Cir. 1975) (suspension; disciplinary board imposed sanction in initial hearing held by district court to be defective; its participation in second hearing did not constitute a due process violation);
- Everett v. Marcase, 426 F. Supp. 397, 402 (E.D. Pa. 1977) (transfers; "The hearing officer should not, of course, be the principal of the school who holds the first informal hearing and recommends the transfer. Likewise, it obviously should not be someone under his direct control or supervision or below him in the 'chain of command';" principal's superior may serve as hearing officer);
- Hillman v. Elliot, *supra*, 436 F. Supp. 812, 816 (W.D. Va. 1977) (three-day suspension; principal suspended student for three days for misconduct; as there was "some uncertainty" about whether defendants had followed their rules, process was repeated, with principal again imposing suspension; no due process violation; prior involvement creates impermissible bias only when it comes from outside the adjudicatory process, just as a judge is not disqualified by prior knowledge gained in hearing preliminary motions);
- Marshall v. Maguire, 102 Misc. 2d 697, 424 N.Y.S.2d 89 (N.Y. Sup. Ct. 1980) (expulsion; participation by same college official in each of the first two levels of the disciplinary process, in violation of school's own rule, "so taints the proceedings" that the student's right to an impartial tribunal was impaired; "new appeal should be heard by a newly constituted Judicial Council in order to avoid any possibility of pre-judging").

Compare:

- Kraut v. Rachford, 51 Ill. App. 3d 206, 216, 366 N.E.2d 497, 504-05 (Ill. Ct. App. 1977) (student dropped on basis of non-residency; "Due process of law, by necessity, requires an impartial decision maker and while this role is not barred to one involved in some aspects of a case, the final arbiter should not have participated in making the determination under review;" not violated here where administrator took previous action concerning different decision; emphasis added).

5. Actual Bias

"Fairness of course requires an absence of actual bias in the trial of cases." In Re Murchinson, *supra*, 349 U.S. at 136, 75 S.Ct. 625. One classic example of actual bias by a district judge provided a basis for reversal of convictions in the trial of the "Chicago Seven." See United States v. Dellinger, 472 F.2d 340, 385-391 (7th Cir. 1972). Here, the court's "deprecatory and often antagonistic attitude toward the defense [was] evident in the record from the very beginning." *Id.*, at 386. In making evidentiary rulings "in comparable situations, the judge was more likely to exercise his discretion against the defense than against the government." *Id.*, at 387. A similar pattern occurred during final argument. *Id.*, at 390. Certain rulings "seem[ed]...to have been motivated by hostility toward the defense." *Id.*, at 387 n. 81. "Most significant, however, were remarks in the presence of the jury, deprecatory of defense counsel and their case." *Id.*, at 387. This was, of course, an atypical, criminal case, with a jury present for much of the offensive conduct.

Citations follow to other decisions bearing on the standards for establishing actual bias, *i.e.*, that the decisionmaker does not *in fact* "hold the balance nice, clear, and true between [the parties]...." In Re Murchinson, *supra*. See also John A. v. San Bernardino City Unified School District, *supra*, 654 P.2d at 247 (Cal. 1982) ("...the concept of bias refers to a mental attitude or disposition towards a party to the proceedings...").

See:

- Hortonville Education Association v. Hortonville Joint School District, *supra*, 426 U.S. at 492, 96 S.Ct. at 2314 ("personal animosity");
- Ikeazu v. University of Nebraska, 775 F.2d 250, 254 (8th Cir. 1985) (academic dismissal from doctoral program; "personal animosity [or] illegal prejudice");
- Staton v. Mayes, 552 F.2d 908, 912-15 (10th Cir. 1977), cert. denied, 434 U.S. 907 (1977) (dismissal of superintendent by school board; prior statements on the merits);
- Barham v. Welch, 478 F. Supp. 1246, 1249 (E.D. Ark. 1979) (dismissal of superintendent by school board; "minds made up before the hearing");
- Jones v. State Board of Education, 279 F. Supp. 190, 200 (M.D. Tenn. 1968), affirmed, 407 F.2d 834 (6th Cir. 1969), cert. dismissed as improvidently granted, 397 U.S. 31 (1970) (indefinite suspensions from university; "malice").

School personnel succeeded in establishing actual bias in several cases:

- Staton v. Mayes, *supra*, 552 F.2d at 912-15 (10th Cir. 1977) (dismissal of superintendent; due process denied where board members made prior statements on the merits, not merely statements on related policy issues; Hortonville distinguished);

- Barham v. Welch, *supra*, 478 F. Supp. 1246 (E.D. Ark. 1979) (discharge of superintendent; evidence established that two of the four board members had prejudged the matter and were incapable of impartial decision);
- Bogart v. Unified School District, 432 F. Supp. 895 (D. Kan. 1977) (dismissal of school teacher; school board deprived teacher of right to an impartial tribunal by basing its initial decision on teacher's jury conviction for possession of marijuana, and by reaffirming its decision at second hearing without any further evidence of wrongdoing after judge acquitted the teacher);
- Crump v. Board of Education, 378 S.E. 2d 32, 40 (N.C. App. 1989) (dismissal of teacher; school board members' denial of their pre-hearing conduct and statements established "disqualifying personal bias"; "...the jury reasonably could have inferred that these disavowals were made to mask a preset judgment").

But see:

- Hortonville Education Association v. Hortonville Joint School District, *supra*, 426 U.S. at 491-94, 96 S.Ct. at 2313-14 (dismissal of striking teachers by school board which previously had been involved in negotiating issues leading to strike; no evidence of "personal animosity");

In one case, decided on preliminary injunction, a student raised substantial questions of actual bias. See Schank v. Hegele, 521 N.E. 2d 9, 11 (Ohio Com. Pl. 1987) (expulsion; volunteering of views to superintendent by school board members before his expulsion decision "indicate the possibility of pressure which, when combined with his role as an investigative officer, bears scrutiny"; these "volunteered views" are a matter "[o]f equal or greater concern" regarding the members' ability to fairly consider the students' appeals). Otherwise, students have not succeeded in establishing actual bias:

See:

- Gorman v. University of Rhode Island, *supra*, 837 F.2d at 15 (1st Cir. 1988) (long-term suspension; "no evidence of bias or prejudice");
- Winnick v. Manning, *supra*, 460 F.2d at 548 (2d Cir. 1972) (suspension for a semester from university; no evidence of "overt bias");
- Brewer v. Austin Independent School District, *supra*, 779 F.2d at 264 (eight-week suspension; no evidence panel member "actually biased");
- Jenkins v. Louisiana State Board of Education, *supra*, 506 F.2d at 1003 (5th Cir. 1975) (suspension; no evidence of bias or prejudice of Board members);
- Murray v. West Baton Rouge Parish School Board, *supra*, 472 F.2d at 443 (5th Cir. 1973) (suspension; no showing of bias);

- Crook v. Baker, 813 F.2d 88, 99-100 (6th Cir. 1987) (revoking of degree for fraud; while chairperson of disciplinary board read evidentiary materials submitted to plaintiff "prior to the hearing" "and felt that the department had a strong case," there is no evidence that he or other board members were "partial");
- Lamb v. Panhandle Community Unit School District No. 2, *supra*, 826 F.2d at 529-30 (7th Cir. 1987) (three-day suspension and missing of final exams; no evidence of bias);
- Ikpeazu v. University of Nebraska, *supra*, 775 F.2d at 254 (8th Cir. 1985) (academic dismissal from doctoral program; student failed to show "actual bias, such as personal animosity, illegal prejudice, or a personal or financial stake in the outcome, to overcome presumption of committee members' honesty and fairness");
- Nash v. Auburn University, *supra*, 812 F.2d at 665 (11th Cir. 1987) (suspension; no evidence that student panel member "performed his duties as a justice having formed an opinion regarding the charges...");
- Sohmer v. Kinnard, *supra*, 535 F. Supp. at 54 (D. Md. 1982) (expulsion with right to reapply; claim of actual bias defeated by Dean's affidavit that he did not make pivotal comment);
- Hillman v. Elliot, *supra*, 436 F. Supp. 812, 816 (W.D. Va. 1977) (three-day suspension; no evidence of actual bias);
- John A. v. San Bernardino City Unified School District, *supra*, 654 P.2d at 247 (Cal. 1982) (expulsion; hearing was "fair and impartial").

F. PROCEDURES AT THE HEARING

1. Right to Counsel or Other Representation

In Goss v. Lopez, 419 U.S. 565, 583-84, 95 S.Ct. 729, 740-41 (1975), the United States Supreme Court specifically declined to hold that the right to counsel was required countrywide for hearings in the normal, short-suspension case having no unusual circumstances. The Court stated that in "difficult cases" of short suspensions the disciplinarian may decide that the use of counsel is warranted, and that unusual circumstances (such as material factual disputes) may require more elaborate procedures.

See Chapter I.C., "What Kind of Due Process;" Chapter II.A., "Suspension for Ten Days or Less." See also Peter Roos, "Goss and Wood: Due Process and Student Discipline," 20 Inequality in Education 42, 44 (1975). Cf. Walters v. National Association of Radiation Survivors, 473 U.S. 305, 105 S.Ct. 3180 (1985) (fee limit for counsel representing veterans in benefit hearings; discusses when counsel is necessary and what kind of representation is required).

(a.) Lower Courts Requiring Right to Counsel

Some courts have adopted the position that counsel is required under the due process clause, at least for long term discipline. In French v. Bashful, 303 F. Supp. 1333, 1337 (E.D. La. 1969), *modified and aff'd per curiam*, 425 F.2d 182 (5th Cir. 1970), the court held that counsel for the student was necessary where the case against the student was prosecuted by a second-year law student. The court spoke of the value of counsel:

Although the right to counsel was not among the rights specifically enumerated by the court in Dixon v. Alabama State Board of Education, 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961)], it cannot be denied that the assistance of an attorney in a trial-type proceeding is of considerable value.... Counsel is best qualified to prepare a defense to the charges, examine the evidence against the defendant, cross-examine witnesses if such a right is permitted, and to otherwise plead the defending student's cause.

The right to cross-examine, in particular, often will be meaningless unless performed by someone with previous experience and training. Counsel is important, too, for safeguarding the student's interests. For example, in Fidler v. Board of Education, 346 F. Supp. 722, 731 n.7 (D. Neb. 1972) (expulsion for the remainder of the year), the court stated: "Permission to appear at the hearing with counsel will have the tendency to hold the proceedings to genuine issues and to assure the student's acting advisedly." However, as shown below, in recent decisions involving college or graduate students, courts have generally found the student able to conduct his or her own defense and cross-examination (with rules often providing for help by some non-lawyer from the educational community).

Support for a right-to-counsel requirement can be found in the commentary to the National Juvenile Law Center's model code:

The presence of counsel is critical to the protection of a student's interests in any politically charged situation. Further, the presence of a representative in addition to the party is critical when one considers the difficulty of maintaining one's control and reason in a highly charged situation such as a disciplinary hearing where one is vulnerable.

The right-to-counsel finds support in the following decisions and consent decrees:

- Jordan v. School District of City of Erie, 583 F.2d 91, 99 (3d Cir. 1978) (consent decree) (disciplinary transfer for from six weeks to one year);
- Black Coalition v. Portland School District No. 1, 484 F.2d 1040, 1045 (9th Cir. 1973) (expulsion for remainder of year);
- Gonzales v. McEuen, 435 F. Supp. 460, 467 (C.D. Cal. 1977) (expulsion for remainder of year);
- Doe v. Kenny, C.A. No. H-76-199 (D. Conn., Oct. 12, 1976) (consent decree) (Clearinghouse No. 19,358C) (right to counsel for hearings concerning disciplinary transfer);
- Mills v. Board of Education, 348 F. Supp. 866, 882 (D.D.C. 1972) (suspension, transfer or other exclusion from student's normal program for more than two days);
- PUSH v. Carey, C.A. Nos. 73-C-2522, 74-C-303 (N.D. Ill., Nov. 5, 1975) (Mem. Opin. and Order, p. 9) (Clearinghouse No. 17,507) (suspensions from high school potentially beyond 10 days), *rev'd in part on other grounds sub nom. Piphus v. Carey*, 545 F.2d 30 (7th Cir. 1976) (reversed because of lower court's failure to award damages to students), *rev'd on other grounds*, 435 U.S. 247, 98 S.Ct. 1042 (1978) (reversing appellate court's holding on damages);
- Quantanilla v. Carey, C.A. No. 75-C-829 (N.D. Ill., Mar. 31, 1975) (Mem. Opin. and Order, p. 6) (Clearinghouse No. 15,369A) (exclusion from regular high school program, with access to GED program, which was "the functional equivalent of an absolute expulsion"; representation by counsel "or another responsible advocate");
- Mello v. School Committee of New Bedford, C.A. No. 72-1146-F (D. Mass., Apr. 6, 1972) (Clearinghouse No. 7,773) (all suspensions);
- Zanders v. Louisiana State Board of Education, 281 F. Supp. 747, 752 (W.D. La. 1968) (expulsion);
- Keene v. Rodgers, 316 F. Supp. 217, 221 (D. Me. 1970) (dismissal from maritime academy);

- Speake v. Grantham, 317 F. Supp. 1253 (S.D. Miss. 1970) (one-year suspension from university);
- Winters v. Board of Education of City of Buffalo, C.A. No. 78-75 (W.D.N.Y., May 25, 1978) (stipulation for entry of judgment and judgment) (Clearinghouse No. 24,455) (suspension beyond five days);
- Givens v. Poe, 346 F. Supp. 202, 209 (W.D.N.C. 1972) (exclusion "for any considerable period of time" from elementary or secondary school);
- Bobbi Jean M. v. Wyoming Valley West School District, C.A. No. 79-576 (M.D. Pa., Nov. 3, 1980) (Clearinghouse No. 30,528B) (consent decree) (exclusion beyond ten days);
- Marin v. University of Puerto Rico, 377 F. Supp. 613, 623 (D.P.R. 1974) (suspension for more than one year);
- Corr v. Mattheis, 407 F. Supp. 847, 853 n.9 (D.R.I. 1976) (termination of federal financial aid);
- Gratton v. Winooski School District Board of Education, C.A. No. 74-86 (D.Vt. April 10, 1974) (Prelim. Injunction, p. 5) (Clearinghouse No. 45,539);
- Giles v. Redfern, C.A. No. ___, (N.H. Super. Ct., Cheshire County, Jan. 18, 1977) (Decree, pp. 15-16) (Clearinghouse No. 20,624) (suspension for remainder of semester from state college; "threats made against lay counsel");
- Carey v. Savino, 91 Misc. 2d 50, 397 N.Y.S.2d 311 (N.Y. Sup. Ct. 1977) (long-term suspension from public school; short period between notice and hearing denied student adequate opportunity to obtain counsel, a statutory right);
- Goldwyn v. Allen, 54 Misc. 2d 94, 99, 281 N.Y.S.2d 899, 905 (N.Y. Sup. Ct. 1967) (withholding the right to take State Regents Exam for one year).

See also:

- In re Gault, 387 U.S. 1, 87 S.Ct. 1428 (1967) (right to obtain counsel in juvenile court, regardless of whether proceedings are criminal or noncriminal);
- Charles Alan Wright, "The Constitution on Campus," 22 *Vand. L. Rev.* 1027, 1075 (1969).

One court ruled that students had the right to the presence of counsel for the purposes of advice, but not cross-examination. Rather, the court held that the students must question adverse witnesses. Esteban v. Central Missouri State College, 277 F. Supp. 649, 651-52 (W.D. Mo. 1967), *approved*, 415 F.2d 1077 (8th Cir. 1969), *cert. denied*, 398 U.S. 965 (1970).

See also:

- Gabrilowitz v. Newman, 582 F.2d 100 (1st Cir. 1978) (where student in school disciplinary hearing was also facing criminal charges, it was denial of due process to refuse request of student who wanted counsel present for advice and consultation only; decision limited to this fact pattern);
- McLaughlin v. Massachusetts Maritime Academy, 564 F. Supp. 809 (D. Mass. 1983) (dismissal from Academy for nonacademic violations; court issued preliminary injunction against dismissal where cadet had no officer as an advisor contrary to academy's regulations, and where, although criminal charges were pending, he did not have "a lawyer of his own choice with whom to consult and advise..."; following Gabrilowitz).

In several cases, institutional rules or practice allowed some, but not an unlimited role for counsel. In each case, the court found no due process violation.

See:

- Crook v. Baker, *supra*, 813 F.2d at 98 (6th Cir. 1987);
- Nash v. Auburn University, *supra*, 621 F. Supp. at 957 (M.D. Ala. 1985);
- Davis v. Mann, *supra*, 721 F. Supp. at 799 (S.D. Miss. 1988);
- Hart v. Ferris State College, *supra*, 557 F. Supp. at 1385 (W.D. Mich. 1983).

Cf.

- Marzette v. McPhee, 294 F. Supp. 562, 567 (W.D. Wis. 1968) ("suspension or expulsion"; court includes right to presence of counsel but does not state whether or not counsel may represent the student in presenting the case and cross-examining witnesses).

Another court refused to hold that a school rule was invalid because it permitted representation by attorneys but did not permit representation by non-lawyers. Graham v. Knutzen, 362 F. Supp. 881, 884 (D. Neb. 1973) (all suspensions); *but see, e.g., Mills*, *supra*, 348 F. Supp. 866, 882 (D.D.C. 1972) ("representative of his own choosing, including legal counsel"); Machosky v. State University of N.Y. at Oswego, 546 N.Y.S. 2d 513, 515-16 (Sup. Ct., Oswego Cty., N.Y. 1989) (failure to adjourn hearing to allow student to secure "advisor" allowed by college code was, in the circumstances, "an abuse of discretion").

In view of the pattern of decisions, it is apparent that advocates seeking the participation of counsel should identify some special circumstance, offering evidence where appropriate. One approach is to utilize the three-part standard of Mathews v. Eldridge, 424 U.S. 319, 333-35, 96 S.Ct. 893, 902, 903 (1976). Here, the challenge will be to link the absence of counsel to a substantial "risk of an erroneous deprivation" of a protected interest and to show "the probable value" to accurate fact finding of counsel's involvement. *Id.*, 424 U.S. at 334-35, 96 S.Ct. at

903. See discussion of Mathews in Chapter I.C.4.-5. A second tactic is to show some "extreme [circumstance]" (Nash v. Auburn University, *supra*, 621 F. Supp. at 958), or a number of special factors. Here, one would show the age of elementary or secondary students; that the government body proceeds by counsel; emotional factors impacting the target of discipline; the overall paucity of procedures; or some particular evidence of unfairness.

(b.) Lower Courts Denying Right to Counsel

The courts that have denied a student's right to a lawyer have generally relied on evidence that, in the particular case, the hearing as a whole was fair and the absence of counsel did not create substantial harm. This line of reasoning is represented by Wasson v. Trowbridge, 382 F.2d 807, 812 (2d Cir. 1967) (dismissal from maritime academy):

The requirement of counsel as an ingredient of fairness is a function of all the other aspects of the hearing. Where the proceeding is non-criminal in nature, where the hearing is investigative and not adversarial and the government does not proceed through counsel, where the individual concerned is mature and educated, where his knowledge of the events ...should enable him to develop the facts adequately through available sources, and where the other aspects of the hearing taken as a whole are fair, due process does not require representation by counsel.

Students claiming the right to counsel have not been successful in some cases, particularly more recently. It is noteworthy that all of these cases, but one, involved post-secondary education, where the factor of a "mature and educated" target of discipline or dismissal (Wasson v. Trowbridge, *supra*) has a possibility of validity. In one case where claims for a more active role for counsel failed [University of Houston v. Sabeti, 676 S.W. 2d 685, 688 (Tex. App. 1984)], the court observed:

Minors may be more in need of counsel's participation than would an adult with greater education, such as appellee.

Also, the single case at the secondary level, where a claim for counsel failed, involved a six-day suspension from school, and a four-month exclusion from extracurricular activities--which the court found to implicate no protected interest. See Davis v. Churchill County School Board of Trustees, 616 F. Supp. 1310, 1314 n.3 (D. Nev. 1985). Lastly, it is significant that schools were not represented by counsel in any of these cases.

See:

- Gorman v. University of Rhode Island, 837 F.2d 7, 16 (1st Cir. 1988) (lengthy suspension; no right to counsel, though student may seek legal advice before or after hearing; student availed himself of right under

university procedures to choose "someone from within the University community to assist him in presenting his case...");

- Hagopian v. Knowlton, 470 F.2d 201, 211-12 (2d Cir. 1972) (separation from military academy; no right to counsel at hearing; cadet "should be capable of" "understand[ing] his rights and express[ing] himself"; student is entitled to seek legal advice and retain counsel to assist in preparing his defense);
- Henson v. Honor Committee of University of Virginia, 719 F.2d 69, 73-74 (4th Cir. 1983) (honor code violation; "Henson was provided with two student-lawyers who consulted extensively with his personally retained attorney at all critical stages of the proceedings"; overall, the rules "provide[d] the accused student with an impressive array of procedural protections");
- Wimmer v. Lehman, 705 F.2d 1402, 1404-06 (4th Cir. 1983) (discharge from naval academy; midshipman was capable of conducting his own defense; no basis for finding that cross-examination by counsel would have elicited anything "of substance");
- Crook v. Baker, 813 F.2d 88, 98-99 (6th Cir. 1987) (degree revoked due to fraud; since student was highly educated and had expertise in the subject of the investigation, there was no right to have counsel examine and cross-examine witnesses);
- Jaksa v. Regents of University of Michigan, 597 F. Supp. 1245, 1251-52 (E.D. Mich. 1984) (one term suspension; student suffered no disadvantage from the lack of "any representative, such as a student-attorney, to aid in the presentation of his case"; proceedings "were not unduly complex," there was an explanatory manual "in plain English," and a dean twice discussed the case with him); *aff'd*, 787 F.2d 590 (6th Cir. 1986);
- Navato v. Sletten, 560 F.2d 340, 345 n.8 (8th Cir. 1977) (denial of certificate of completion of residency program);
- Rustad v. United States Air Force, 718 F.2d 348, 349 n.*, 350 (10th Cir. 1983) (air force cadet disenrolled; cadet had no right to be represented by counsel at proceeding before hearing officer or before Academy Board; under rule, cadet had a right to have counsel "standing by" "for consultation at any recess...");
- Nash v. Auburn University, 621 F. Supp. 948, 957-58 (M.D. Ala. 1985) (one-year suspension for academic dishonesty; in the absence of "extreme circumstances" "the right of plaintiffs to have counsel present at the hearing," but not actively participate, "afforded them more, not less, than the Constitution requires"); affirmed as to other issues, 812 F.2d 655 (11th Cir. 1987);
- Due v. Florida A. & M. University, 233 F. Supp. 396, 403 (N.D. Fla. 1963) (indefinite suspension);
- Sohmer v. Kinnard, 535 F. Supp. 50, 54 (D. Md. 1982) (dismissal from graduate program; no right to bring attorney to disciplinary proceeding);

- Hart v. Ferris State College, 557 F. Supp. 1379, 1385-88 (W.D. Mich. 1983) (student sought injunction to stay disciplinary hearing until criminal charges were resolved; court found that cross-examination by counsel would be of minimal value and would not lower risk of erroneous deprivation, and the burden on the school outweighed the student's interest; student could question witnesses, consult with counsel, and have counsel make a statement on her behalf);
- Davis v. Mann, 721 F. Supp. 796, 801-02 (S.D. Miss. 1988) (academic dismissal from dental school residency program; no right to have attorney, who was allowed to be present at hearing, examine and cross-examine witnesses; furthermore, no substantial prejudice shown);
- Davis v. Churchill County School Board of Trustees, 616 F. Supp. 1310 (D. Nev. 1985) (six-day suspension and exclusion from extracurricular activities for remainder of year; due process does not require representation by counsel for short suspensions);
- Kolsea v. Lehman, 534 F. Supp. 590 (N.D. N.Y. 1982) (disenrollment of student from university NROTC program and order to commence two years of active duty; following Hagopian, *supra*);
- Blecker v. Board of Trustees, 485 F. Supp. 1381, 1388 (S.D. Ohio 1980) (student in school of veterinary medicine, subject to two-semester dismissal for cheating, failed to establish how presentation of her case would have been aided by counsel, particularly when counsel presented same evidence to court, with no difference in outcome);
- Garshman v. Pennsylvania State University, 395 F. Supp. 912, 920-21 (M.D. Pa. 1975) (dismissal; student was an "educated individual" afforded "extensive procedural safeguards...");
- Haynes v. Dallas County Junior College District, 386 F. Supp. 208, 211-12 (N.D. Tex. 1974) (suspensions);
- Mary M. v. Clark, 473 N.Y.S. 2d 843, 845 (N.Y. App. 1984) (one-semester suspension from university for academic dishonesty; no right to counsel; extensive procedures including "the right to have someone from the college community to assist her in the proceedings");
- University of Houston v. Sabeti, 676 S.W.2d 685 (Tex. Ct. App. 1984) (expulsion; where, overall, "record shows that a fair hearing was conducted which gave [Sabeti] fair opportunity to defend...", the fact that "his counsel of choice, a law student" could attend the hearing and advise him, but not "speak, argue or question witnesses...", did not violate procedural safeguards; however, "[m]inors may be more in need of counsel's participation than would an adult with greater education...");

Cf.:

- Downing v. LeBritton, 550 F.2d 689 (1st Cir. 1977) (in the absence of any specific showing of inadequate opportunity to defend, a discharged employee is not entitled to be represented by outside counsel where university rules permitted him to be represented by any of several thousand

fellow employees, there was access to counsel for preparation and advice, and there were other significant procedural protections).

The right to counsel has been denied in relation to a hearing before a body which was only "advisory" and "investigative," Barker v. Hardway, 283 F. Supp. 228, 238 (S.D. W. Va. 1968), *aff'd per curiam*, 399 F.2d 638 (4th Cir. 1968), *cert. denied*, 394 U.S. 905 (1969); and in a school guidance conference, Madera v. Board of Education, 386 F.2d 778 (2d Cir. 1967).

(c.) Right to Counsel at Public Expense

On the occasions where a plaintiff could not afford counsel and asserted the right to an attorney at public expense, courts refused to require that legal assistance be provided for certain disciplinary hearings.

See:

- Linwood v. Board of Education, 463 F.2d 763, 770 (7th Cir. 1972), *cert. denied*, 409 U.S. 1027 (1972) (expulsion for remainder of semester);
- Everett v. Marcuse, 426 F. Supp. 397, 402 (E.D. Pa. 1977) (disciplinary transfers).

Cf.:

- Givens v. Poe, *supra*, 346 F. Supp. 202, 209 (W.D.N.C. 1972) ("the right to be represented by counsel, though not at public expense").

(d.) Notice of Sources of Free Legal Assistance

Some courts have held that students and parents must be notified of sources of legal assistance.

See:

- Jordan, *supra*, 583 F.2d 91, 99 (3d Cir. 1978);
- Winters, *supra*, C.A. No. 78-75 (W.D.N.Y., May 25, 1978) (Clearinghouse No. 24,455);
- Mills, *supra*, 348 F. Supp. 866, 882 (D.D.C. 1972).

See also: Hairston v. Drosick, 423 F. Supp. 180, 185 (S.D. W. Va. 1976) (transfer into special education classes).

But see: John A. v. San Bernardino City Unified School District, 33 Cal. 301, 309-10, 654 P.2d 242, 247-48, 187 Cal. Rptr. 472, 477-78 (Cal. 1982) (expulsion; notice need not identify sources of free legal services).

See Chapter III.B.10., "Notice of Sources of Legal Assistance."

2. Right to Interpreter

The right to an interpreter at the hearing arises from the due process clause, anti-discrimination laws, and, where applicable, state bilingual education laws.

"All hearings and conferences required by this policy shall be conducted by persons fluent in the primary language of the student's home or with the assistance of an interpreter."

Smith v. Ryan, C.A. No. B-75-309 (D. Conn., Oct. 25, 1978) (Consent Judgment, p. 2) (Clearinghouse No. 25,461A) (all forms of discipline).

"A student is entitled to the services of a translator, to be provided by the Board of Education, upon the request of the student, his parent(s) or guardian(s)."

Doe v. Kenny, C.A. No. H-76-199 (D. Conn., Oct. 12, 1976) (Consent Decree, p. 4) (Clearinghouse No. 19,358C) (disciplinary transfers).

"The opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard."

Goldberg v. Kelly, 397 U.S. 254, 268-69, 90 S.Ct. 1011, 1021 (1970).

"[The opportunity to be heard] must be granted at a meaningful time and in a meaningful manner."

Armstrong v. Manzo, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191 (1965).

See generally:

- Niarchos v. Immigration and Naturalization Service, 393 F.2d 509, 511 (7th Cir. 1968) (in dictum, court alludes to "the shocking circumstances of the 1962 deportation hearing" conducted "without an interpreter, in a language the subject of the hearing can neither understand nor speak");
- Tejeda-Mata v. Immigration and Naturalization Service, 626 F.2d 721, 726-27 (9th Cir. 1980) ("...this court and others have repeatedly recognized the importance of an interpreter to the fundamental fairness of ...a [deportation] hearing if the alien cannot speak English fluently"; citing other decisions);
- El Rescate Legal Services v. Exec. Office for Imm. Rev., 727 F. Supp. 557, 559-62 (C.D. Cal. 1989) ("...violation of the plaintiffs' statutory due process rights in both exclusion hearings and deportation hearings"; "...failure to require full interpretation of immigration court proceedings seriously

undermines the plaintiffs' statutory right to be present at their proceedings, their right to counsel, their right to examine evidence, and their right to confront and cross-examine witnesses");

- Hairdar v. Coomey, 401 F. Supp. 717, 720-21 (D. Mass. 1974) (deportation proceeding; interpreting "adequate" where "plaintiff did in fact both understand fully the proceedings and have ample opportunity to express himself").

"A recipient [of federal funds] ... may not ... utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin."

34 C.F.R. §100.3(b)(2) [regulations implementing Title VI of the 1964 Civil Rights Act, 42 U.S.C. §2000d].

"No state shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by-- ...

- (f) the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs."

20 U.S.C. §1703 (Equal Educational Opportunities Act of 1974).

See also §III.A., "Race and National Origin Discrimination" (especially the subsection on bilingual students); §V.A.1., "Language of Rules;" in the Center's 1982 manual *School Discipline and Student Rights*, and Ch. III.B.3., "Notice" (subsection on language of notice).

3. Open/Closed Hearing

It would seem fair to a student who desired to exclude persons not connected with the hearing proceedings to require that the hearing be private. Especially for minors, the desire for privacy and anonymity would clearly outweigh any public interest in keeping the doors to the hearing room open. The issue has not come up in litigation, probably because school officials uniformly agree to this general principle. In contrast, the student who strongly desires to make the hearing public stands on different footing. There are space limitations and considerations of order and atmosphere which would argue for at least limiting the number of observers who may

enter the room. On the other hand, however, the exclusion of a limited number of representatives of student newspapers or governing bodies have serious first amendment implications quite apart from the rules of procedural due process. In shaping its general order, the court in Mills v. Board of Educ., 348 F. Supp. 866, 882 (D.D.C. 1972) [suspension, transfer, or other exclusion from student's normal program for more than two days] made it optional with the student/parent: 'The hearing shall be a closed hearing unless the child, his parent or guardian requests an open hearing.'

Center for Law and Education, The Constitutional Rights of Students 246 (1976).

(a.) Right to Closed Hearing

A few courts have been presented with the issue and upheld the student's right to a closed hearing.

See:

- Hairston v. Drosick, 423 F. Supp. 180, 185 (S.D. W.Va. 1976) (placement in special education classes; due process requirements would be fulfilled by implementing regulations which provide, in part, "that the hearing shall be closed to the public unless the parents request an open hearing");
- Marston v. Gainesville Sun Publishing Co., 341 So. 2d 783 (Fla. Dist. Ct. App. 1976) (student disciplinary hearings properly closed; open meeting law does not require hearings to be open to the public or press without student consent).

Cf.:

- Doe v. Kenny, C.A. No. H-76-199 (D. Conn., Oct. 12, 1976) (Consent Decree, p. 4) (Clearinghouse No. 19,358C) (disciplinary transfers; "student will have the right ... to request that the panel exclude all those persons who do not have a legitimate educational interest in the student");
- Bobbi Jean M. v. Wyoming Valley West School District, C.A. No. 79-576 (M.D. Pa., Nov. 3, 1980) (Consent Decree, "Sample Notice", p. 2) (Clearinghouse No. 30,528B) (exclusion beyond ten days; "The right to have the hearing held in private, upon request by you or your child").

The Family Educational Rights and Privacy Act of 1974, 20 U.S.C. §1232g, governs the privacy of student records in educational institutions which receive federal education funds. The Act may have implications for the student's right to a closed hearing, since information from a student's record cannot be released, orally or in writing, to anyone without written consent of the parent (or student if over eighteen). One of the few exceptions (and the only one of relevance here) is that the records are available to school personnel with legitimate educational interests in the records. (See §XII.A., "Student Records," in the Center's 1982 manual *School Discipline and Student Rights*.)

(b.) Right To Open Hearing

As to the student's right to an open hearing, one court noted: "[S]uch hearings should be open to the press when this is possible without interference with the orderly operation of the educational institution." Moore v. Student Affairs Committee, 284 F. Supp. 725, 731 (M.D. Ala. 1968) (indefinite suspension; court declined to invalidate the hearing on this point because of other extensive procedural safeguards, existence of a transcript, and a threat to "order and discipline on campus...").

See:

- Doe v. Kenny, *supra*;
- Mills, *supra*, 348 F. Supp. at 882 (D.D.C. 1972) ("The hearing shall be a closed hearing unless the child, his parent or guardian requests an open hearing.");
- Bobbi Jean M., *supra*;
- Hairston, *supra*, 423 F. Supp. at 185 (S.D. W. Va. 1976).

Cf.:

- Morale v. Grigel, 422 F. Supp. 988, 1004 (D.N.H. 1976) (one term suspension; "Whether or not an open hearing is constitutionally mandated is an issue which I need not resolve in this case, but I do note that for cases which attract schoolwide attention, open hearings would avoid, at a minimum, the appearance of arbitrary decision-making violative of the Fourteenth Amendment.").

The right to an open hearing has not found universal acceptance.

See:

- Linwood v. Board of Education, 463 F.2d 763, 770 (7th Cir. 1972), *cert. denied*, 409 U.S. 1027 (1972) (expulsion for remainder of semester);
- Zanders v. Louisiana State Board of Education, 281 F. Supp. 747, 768 (W.D. La. 1968) (expulsion);
- Hart v. Ferris State College, 557 F. Supp. 1379, 1389 (W.D. Mich. 1983) (injunction sought to stay disciplinary hearing; no right to an open hearing; presence of other students would not "decrease the risk of an erroneous expulsion" and instead would "be disruptive to the proceedings;" state open meeting law held to be inapplicable);
- General Order on Judicial Standards of Procedure and Substance in Review of Student Discipline in Tax-Supported Institutions of Higher Education, 45 F.R.D. 133, 146-47 (8th Cir. 1968).

Cf.:

- Davis v. Churchill County School Board of Trustees, 616 F. Supp. 1310, 1313-14 (D. Nev. 1985) (six-day suspensions and exclusion from extracurricular activities; constitutionality of state open meeting law upheld, including exemption for student disciplinary hearings; "Nothing prohibits the student from recording the hearing and later releasing the recording.").

Compare:

- Lamb v. Panhandle Community Unit School District No. 2, 826 F.2d 526, 529 (7th Cir. 1987) (suspension for final three days of school; student, having had an opportunity to present his case to the school board, had no right to be present during the board's deliberations).

4. Adverse Witnesses and Evidence: Confrontation, Cross-Examination and Compulsory Process

"In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses."

Goldberg v. Kelly, 397 U.S. 254, 269, 90 S.Ct. 1011, 1021 (1970).

(a.) Distinguishing Cross-Examination, Confrontation, Compulsory Process and Their Purposes

Judicial language sometimes fails to distinguish between confrontation and cross-examination. *Cross-examination* is the questioning of adverse witnesses who testify at the hearing. The right to cross-examine does not guarantee that witnesses who have made statements against a student prior to the hearing will be present at the hearing.

The right of *confrontation* guarantees that those who make statements against a student will present themselves in person at the hearing. Without the right of confrontation, the school's case against the student could be presented solely through written statements and the right of cross-examination would be irrelevant.

Compulsory process is a system under which any witness who is properly asked to appear at the hearing must do so. Confrontation places a restriction on the prosecution: if a witness does not appear, the prosecution cannot use statements of that witness against the student. Compulsory process, on the other hand, places a burden on the witness. If the witness is called, he/she must appear or, presumably, face a penalty of some kind. Further, compulsory process

systems can be used to call witnesses for as well as against the student. For instance, a student or teacher who witnessed an event and whose testimony would tend to support the accused student may be reluctant to appear. Without compulsory process, adverse testimony from another witness might then go without rebuttal. Further, compulsory process may be superior to confrontation alone even in dealing with adverse testimony, since it helps eliminate the possibility that statements which cannot be considered (because the witness has not appeared) nevertheless influence the hearing tribunal's judgment.

Confrontation and cross-examination are relied upon to insure that the hearing arrives at the truth. The questioning of adverse witnesses, when properly performed, can bring out new facts, reveal unnoticed and misleading assumptions in the previous testimony, identify bias or animosity, and otherwise provide a basis for deciding between witnesses who give conflicting testimony, and place already known facts in proper context. Beyond its contribution to correct results, however, confrontation lends an important element of fairness to the process itself. The right to "look your accusers in the eye" is central to the creation of a legitimate forum.

(b.) General Legal Background

In Goss v. Lopez, 419 U.S. 565, 583-84, 95 S.Ct. 729, 740-41 (1975), the Supreme Court specifically declined to hold that the rights "to confront and cross-examine witnesses supporting the charge" were required countrywide for hearings in the normal, short-suspension case having no unusual circumstances. The Court stated that where "permitting the student to give his version of...events" surfaces "the existence of disputes about facts and arguments about cause and effect," the disciplinarian "may...determine himself to...permit cross-examination...."

As in other areas of due process, courts addressing longer exclusions have tended to take a flexible approach to the question of whether confrontation and cross-examination are required. Decisions are based on the extent to which these procedures contribute to a fair determination. Thus, in Winnick v. Manning, 460 F.2d 545, 549-50 (2d Cir. 1972) (suspension for one semester), the court stated that, while cross-examination "might have been essential to a fair hearing" if credibility had been at issue, in this case "cross-examination would have been a fruitless exercise," since the one point on which the student had wanted cross-examination had no bearing on the outcome and the point in the witness's testimony which did affect the outcome was admitted by the student.

In contrast, the court in DeJesus v. Penberthy, 344 F. Supp. 70, 75 (D. Conn. 1972) (expulsion), distinguished Winnick and stated:

This is not to suggest that adherence to the hearsay rule is an invariable requirement of the Due Process Clause. But where as here there is a factual dispute on critical issues that will determine the propriety of such a serious penalty as expulsion, due process does require that readily available testimony be presented to the

fact-finders in person, at least in the absence of any extenuating circumstances.

The court further found that only in extreme situations should the right to cross-examine be denied. The court held that school officials had the burden of demonstrating unusual circumstances to justify the absence of cross-examination, at least in situations with consequences as serious as expulsion and in which there is a significant factual dispute. *Id.* at 76. (See quote below concerning student witnesses.)

(c.) Right to Cross-Examine

Some courts have held that due process requires the opportunity for cross-examination of adverse witnesses. These decisions either do not mention or do not explicitly deny the right of confrontation.

See:

- Black Coalition v. Portland School District No. 1, 484 F.2d 1040, 1045 (9th Cir. 1973) (expulsion for remainder of year);
- PUSH v. Carey, C.A. Nos. 73 C-2522, 74-C-303 (N.D. Ill., Nov. 5, 1975) (Mem. Opin. and Order, p. 9) (Clearinghouse No. 17,507A) (suspensions potentially beyond ten days), *rev'd in part on other grounds sub nom. Piphus v. Carey*, 545 F.2d 30 (7th Cir. 1976) (reversed because of lower court's failure to award damages to students), *rev'd on other grounds*, 435 U.S. 247, 98 S.Ct. 1042 (1978) (reversed and remanded on damages issue);
- Quintanilla v. Carey, C.A. No. 75-C-829 (N.D. Ill., Mar. 31, 1975) (Mem. Opin. and Order, p. 6) (Clearinghouse No. 15,369A) (disciplinary transfer equivalent to permanent expulsion);
- Keene v. Rodgers, 316 F. Supp. 217, 221 (D. Me. 1970) (dismissal from maritime academy);
- Mello v. School Committee of New Bedford, C.A. No. 72-1146F (D. Mass., Apr. 6, 1972) (Temporary Injunction, p. 2) (Clearinghouse No. 7,773) (any exclusion);
- Winters v. Board of Education of City of Buffalo, C.A. No. 78-75 (W.D.N.Y., May 25, 1978) (Stipulation for Entry of Judgment, p. 5 and Judgment) (Clearinghouse No. 24,455) (suspension beyond five days);
- Marin v. University of Puerto Rico, 377 F. Supp. 613, 623 (D.P.R. 1974) (suspension for more than one year);
- Marzette v. McPhee, 294 F. Supp. 562, 567 (W.D. Wis. 1968) ("suspension or expulsion").

Cf.:

- Esteban v. Central Missouri State College, 277 F. Supp. 649,651 (W.D. Mo. 1967), *approved*, 415 F.2d 1077 (8th Cir. 1969), *cert. denied*, 398 U.S. 965 (1970) (exclusion for two semesters; right of cross-examination is to be exercised by the student, not by his or her legal counsel).

On the other hand, some courts have not required unrestrained cross-examination. Some of these holdings rely upon the particular facts of the case.

See:

- Gorman v. University of Rhode Island, 837 F.2d 7, 16 (1st Cir. 1988) (long-term suspension; allowing cross-examination of witnesses as to "the facts and events in issue" but not potential bias was consistent with due process guarantees);
- Winnick v. Manning, *supra*, 460 F.2d at 549-50 (2d Cir. 1972) (lengthy suspension; no need for cross-examination in particular circumstances);
- Dixon v. Alabama State Board of Education, 294 F.2d 150,159 (5th Cir. 1961), *cert. denied*, 368 U.S. 930 (1961) (expulsion; "an opportunity to hear both sides in considerable detail" but not "a full-dress judicial hearing, with the right to cross-examine witnesses...");
- Nash v. Auburn University, 812 F.2d 655, 663-64 (11th Cir. 1987) (long-term suspension for academic dishonesty; opportunity only to "pose questions of the accusing witnesses by directing their questions to the presiding board chancellor, who would then direct [the] questions to the witnesses" did not deny students' due process rights);
- Davis v. Ann Arbor Public Schools, 313 F. Supp. 1217, 1227 (E.D. Mich. 1970) (suspension for remainder of semester; following Dixon);
- Behagen v. Intercollegiate Conference of Faculty Representatives, 346 F. Supp. 602, 608 (D. Minn. 1972) (suspension from intercollegiate basketball competition for remainder of season; following Dixon);
- Fenton v. Stear, 423 F. Supp. 767, 772 (W.D. Pa. 1976) 11-day "in-school restriction [which] did not deprive him of any in-school education"; student had already admitted to witness's accusation);
- University of Houston v. Sabeti, 676 S.W. 2d 685 (Tex. App. 1984) (permanent expulsion for cheating; cross-examination limited to student's right to suggest questions to hearing officer, some of which were asked of witnesses; no due process violation).

(d.) Right to Confront and Cross-Examine

Some courts have recognized rights of both confrontation and cross-examination of adverse witnesses.

See:

- Dillon v. Pulaski County Special School District, 468 F. Supp. 54, 57-58 (E.D. Ark. 1978), *aff'd*, 594 F.2d 699 (8th Cir. 1979) (violation of due process when decision to expel student was based on written statement of teacher without opportunity to confront and cross-examine; seemingly distinguishing, *in dicta*, student witnesses);
- Anable v. Ford, 653 F. Supp. 22, 41-42 (W.D. Ark. 1985) (possible expulsion for drug use; "[d]ue process considerations would require" "the right to confront and cross-examine their [student] accusers"; *dictum*);
- Gonzales v. McEuen, 435 F. Supp. 460, 467-70 (C.D. Cal. 1977) (expulsion for remainder of year);
- DeJesus v. Penberthy, *supra*, 344 F. Supp. at 75-76 (D. Conn. 1972) (expulsion);
- Mills v. Board of Education, 348 F. Supp. 866, 883 (D.D.C. 1972) (suspension, transfer, or exclusion from student's normal program for more than two days);
- Speake v. Grantham, 317 F. Supp. 1253, 1257-58 (S.D. Miss. 1970) (long-term suspension from university);
- Graham v. Knutzen, 351 F. Supp. 642, 665-66 (D. Neb. 1972) (all suspensions; right to confront and cross-examine faculty, but not student witnesses);
- Fielder v. Board of Education, 346 F. Supp. 722, 724, 730-31 (D. Neb. 1972) (expulsion for remainder of year; persons with primary awareness of the facts must be present and available for cross-examination; it is the school's duty to call them, not the student's);
- Givens v. Poe, 346 F. Supp. 202, 209 (W.D.N.C. 1972) (suspensions "for any considerable period of time");
- Corr v. Matthews, 407 F. Supp. 847, 853 (D.R.I. 1976) (termination of federal financial aid);
- Gratton v. Winooski School District, C.A. No. 74-86 (D. Vt., Apr. 10, 1974) (Preliminary Injunction, p. 5) (Clearinghouse No. 45,539) (indefinite suspension; student has right to cross-examine and school must assist in arranging attendance at hearing of anyone who submitted evidence);
- Warren County Board of Education v. Wilkinson, 500 So. 2d 455, 458, 461 (Miss. 1986) (loss of credit for a semester; accusing teachers must be available at hearing for cross-examination);
- Tibbs v. Board of Education, 114 N.J. Super. 287, 295-96, 276 A.2d 165, 170 (N.J. Super. Ct. 1971) (expulsions of high school students based upon physical assaults on other students; expulsions set aside "for failure to produce the accusing witnesses for testimony and cross-examination");

- DePrima v. Columbia-Green Community College, 89 Misc. 2d 620, 392 N.Y.S.2d 348, 350 (N.Y. Sup. Ct. 1977) (possible expulsion, and exclusion from extracurricular activities, and indication of wrongdoing on record);
- North v. West Virginia Board of Regents, 233 S.E.2d 411, 417 (W. Va. 1977) (expulsion).

Cf.:

- McGhee v. Draper, 564 F.2d 902, 911 (10th Cir. 1977) (discharge of non-tenured teacher; right to confront and cross-examine where accusers were attacking her morality and fitness to teach);
- Doe v. Kenny, C.A. No. H-76-199 (D. Conn., Oct. 12, 1976) (Consent Decree, p. 4) (Clearinghouse No. 19,358C) (transfers);
- Hart v. Ferris State College, 557 F. Supp. 1379, 1388-89 (W.D. Mich. 1983) (court would not issue pre-liminary injunction to stay disciplinary hearing on basis of denial of opportunity to confront and cross-examine when school had assurances that the arresting officer would be present at hearing);
- Ross v. Disare, 500 F. Supp. 928, 933 (S.D.N.Y. 1977) (In suspensions longer than five days, use of written statements instead of presenting witnesses violates state statute);
- Bobbi Jean M. v. Wyoming Valley West School District, C.A. No. 79-576 (M.D. Pa., Nov. 3, 1980) (Clearinghouse No. 30,528B) (Consent Decree, "Sample Notice", p. 2) ("right to demand that those witnesses listed appear in person at the expulsion hearing and be subject to cross-examination by the student or his attorney");
- Hairston v. Drosick, 423 F. Supp. 180, 185 (S.D. W. Va. 1976) (due process required for placement in special education classes would be satisfied by implementing regulations which provide, in part, for right to confront and cross-examine all witnesses);
- John A. v. San Bernardino City Unified School District, 654 P. 2d 242, 246 (Cal. 1982) (expulsion for remainder of school year for unprovoked attack on two students; where "evidence...was in sharp dispute," and administration relied upon written statements of other students although there was "no showing that the witnesses were unavailable...." expulsion did not accord with statute providing that "...evidence may be admitted and given probative effect only if it is the kind of evidence upon which reasonable persons are accustomed to rely in the conduct of serious affairs");
- Franklin v. District Board of Education, 356 So. 2d 931 (Fla. Dist. Ct. App. 1978) (expulsion; under state law, hearsay evidence could be used as supplementary proof, but affidavits, standing alone, are not sufficient to support a finding unless they would be admissible in civil actions);
- Board of Education of City of Plainfield v. Cooperman, 105 N.J. 587, 523 A.2d 655, 661-62 (N.J. 1987) (guidelines for admission to school of children with AIDS, ARC, or HTLV-III antibody; "the right to call witnesses with the attendant right of cross-examination must be provided automatically upon the request of the parties").

Other decisions do not support students seeking the right to confront and cross-examine witnesses. Once again, students and their advocates should attempt to identify facts showing that in the particular case these rights are necessary to insure accurate factfinding. See Mathews v. Eldridge, *supra*, 424 U.S. at 334-35, 96 S.Ct. at 902-03.

See:

- Brewer v. Austin Independent School District, 779 F.2d 260, 263 (5th Cir. 1985) (eight-week suspension; no right to confront or cross-examine students whose statements were "considered in determining the appropriate length of the punishment");
- McClain v. Lafayette County Board of Education, 673 F.2d 106, 110 (5th Cir. 1982); 687 F.2d 121 (5th Cir. 1982) (rehearing denied) (suspension for remainder of year; while "the playing of...tapes" of other students' statements "might be a denial of due process" in some circumstances, there was no due process violation here where "they were merely cumulative on an issue in which [the student] had conceded his guilt...");
- Tasby v. Estes, 643 F.2d 1103, 1106 (5th Cir. 1981) ("serious student offenses"; students "cannot bring a teacher without the principal's permission or bring a fellow student without his parent's permission"; "...[N]o showing that any student has ever been denied the right to bring a necessary witness before the Hearing Board, and rights in a student disciplinary hearing may properly be determined upon the hearsay evidence of school administrators who investigate disciplinary infractions.");
- Boykins v. Fairfield Board of Education, 492 F.2d 697, 701-02 (5th Cir. 1974), *cert. denied*, 420 U.S. 962 (1975) (exclusions of various lengths, including expulsion; evidence included principal's "reading or reciting statements made by teachers in response to his inquiries"; court declines to require observation of "the common-law rules of evidence"; "It may well be" that all controlling decisions require "is precisely what [students] were accorded: a right to confront and cross-examine such adverse witnesses as appear, without the technical strictures upon their testimony of the hearsay rule"; emphasis on original);
- Paredes v. Curtis, 864 F.2d 426, 428-29 (6th Cir. 1988) (10-day suspension for possession of "a drug look-alike substance"; finding of possession of substance, never located, was based upon the statement of an anonymous student; as this is the usual short suspension addressed by Goss, no right to confront or cross-examine anonymous student);
- Newsome v. Batavia Local School District, 842 F. 2d 920, 924-26 (6th Cir. 1988) (expulsion; no right to cross-examine student accusers or to at least know their identities; no right to cross-examine school principal and superintendent);
- Jaksa v. Regents of University of Michigan, 597 F. Supp. 1245, 1252-55 (E.D. Mich. 1984) (one term suspension; student has no constitutional right to confront the anonymous student who reported the cheating incident; his professor was his "real accuser" and was subject to cross-examination; *aff'd*, 787 F. 2d 590 (6th Cir. 1986);

- Brands v. Sheldon Community School, 671 F. Supp. 627, 632 (N.D. Iowa 1987) (disciplinary exclusion from sports team; "Absent direct contradictory evidence, hearsay could be relied upon");
- Whiteside v. Kay, 446 F. Supp. 716 (W.D. La. 1978) (expulsion for second semester of school year; "The School Board need not have afforded Whiteside the advantage of compulsory process or cross-examination.");
- Ekelund v. Secretary of Commerce, 418 F. Supp. 102, 106 (E.D.N.Y. 1976) (dismissal from merchant marine academy; use of hearsay evidence permissible; board could not compel local police to appear; two eyewitnesses to search which uncovered drugs were present and cross-examined).
- Davis v. Churchill County School Board of Trustees, 616 F. Supp. 1310, 1314-15, (D. Nev. 1985) (six-day suspension and exclusion from extracurricular activities; no right to confront and cross-examine witnesses;
- Birdsey v. Grand Blanc Community Schools, 130 Mich. App. 718, 726, 344 N.W.2d 342, 346 (Mich. Ct. App. 1983) (expulsion; "Due process does not require an opportunity to confront and cross-examine witnesses inasmuch as plaintiffs did not refute the underlying facts of the charge");
- Shank v. Hegele, 521 N.E. 2d 9 (Ohio Com. Pl. 1987) (expulsions for alleged vandalism; reliance on "hearsay evidence" permissible);
- Jones v. Pascagoula Municipal Separate School District, 524 So. 2d 968 (Miss. 1988) (expulsion for remainder of school year; confrontation and cross-examination not required in circumstances of this case);
- Racine Unified School District v. Thompson, 321 N.W. 2d 334, 337-39 (Wisc. App. 1982) (expulsion; "...due process...satisfied even though some of the testimony presented was hearsay given by members of the school staff").

(e.) Protection of Student Witnesses

As indicated above, distinctions are at times made between student and staff witnesses.

One court has held that due process required the opportunity to confront and cross-examine faculty witnesses but refused to require that student witnesses appear for fear of reprisals. Graham v. Knutzen, *supra*, 351 F. Supp. at 665-66, 669 (D. Neb. 1972) (all suspensions); memorandum and order, 362 F. Supp. 881 (1973). See also Newsome v. Batavia Local School District, *supra*, 842 F.2d at 924-25 (6th Cir. 1988) (expulsion; no right to cross-examine student; the credibility of an accusing student's statement is assessed by an administrator who would likely know of any animus between the accuser and the accused, and the burden on the school's interest of preventing ostracism and reprisal outweighs the student's interest); Dillon v. Pulaski Cty. Special School District, *supra*, 468 F. Supp. at 57 (E.D. Ark. 1978), *aff'd*, 594 F.2d 699 (8th Cir. 1979) (holding that lack of confrontation and cross-examination of teacher denied due process of law; seemingly approving, in dicta, Graham v. Knutzen rule as to student witnesses);

Jaksa v. Regents of University of Michigan, *supra*, 597 F. Supp. at 1253 (E.D. Mich. 1984), *aff'd*, 787 F.2d 590 (6th Cir. 1986) (relying in part on Dillon dicta re student witnesses). Cf. Green v. Board of School Commissioners of City of Indianapolis, 716 F.2d 1191, 1193 (7th Cir. 1983) (bus driver discharged; school board could prevent confrontation and conceal identity of students in order to protect children who had complained of bus driver's sexual advances; "procedures [employed in securing statements] adequately protected Green against any risk that the children were out to get him").

On the other hand, in DeJesus v. Penberthy, *supra*, 344 F. Supp. at 76 (D. Conn. 1972), the court found a violation of due process when a student was expelled on the basis of written statements about facts in dispute made by students who did not appear at the hearing. While the court allowed for the possibility that certain situations might justify not calling a "youthful witness," it clearly placed the burden on the school:

In a case such as this, involving expulsion, the accusing testimony should normally be taken in the presence of the plaintiff and subject to cross-examination. However, if upon a convincing showing to the Board by school authorities, the Board determines that confrontation and even cross-examination will inhibit rather than advance the search for truth, the Board may hear the witnesses (or some of them) out of the presence of the accused student, and, in extreme cases, omit cross-examination by the accused student or his representative. Responsibility for probing the accusing testimony will then rest with the Board. If testimony is taken in the absence of the accused student, he must be furnished with a summary of the testimony he was not permitted to hear. Of course, the Board's conclusion to dispense with confrontation or cross-examination must be based on a good faith decision, supported by persuasive evidence, that the accusing witness will be inhibited to a significantly greater degree than would result simply from the inevitable fact that his accusations will be made known to the accused student. Such a conclusion might also be based on special circumstances concerning the accusing witness.

In this case, however, there is nothing to indicate that the Board had any valid basis for dispensing with confrontation of the accusing witness or his cross-examination.

Note that the court would not permit, under any circumstances, the use of testimony or statements without revealing to the accused student the content of the witness's testimony. Cf. John A. v. San Bernardino City Unified School District, *supra*, 33 Cal. 3d at 308, 654 P.2d at 246, 187 Cal. Rptr. at 477 (Cal. 1982) (expulsion; finding use of statements without confrontation to violate statute, but stating: "We do not preclude the board from relying upon statements and reports where it finds that disclosure of identity and producing the witnesses would subject the [student] informant to significant and specific risk of harm").

A New Jersey court was more definitive in rejecting the use of unsigned statements by student witnesses who feared retaliation in an expulsion case: "[T]he

school community must be content to deal with threats or intimidation of the kind allegedly encountered by invoking the jurisdiction of the law enforcement authorities who must be presumed equal to their responsibilities." Tibbs, *supra*, 114 N.J. Super. 287, 297, 276 A.2d 165, 171 (1971). The court stated that cross-examination of school children witnesses should "be carefully controlled by the hearing officer or body, limited to the material essentials of the direct testimony, and not be unduly protracted." *Id.*

(f.) Right to Compulsory Process

Most of the courts recognizing the right to confront and cross-examine seem to assume that statements by witnesses who do not present themselves for cross-examination simply cannot be considered. Thus, these courts have not stated that the school has a duty to produce adverse witnesses whose statements will be used or to compel the attendance of witnesses favorable to the student.

In Linwood v. Board of Education, 463 F.2d 763, 770 (7th Cir. 1972), *cert. denied*, 409 U.S. 1027 (1972), the court refused to hold that the student had a right to compulsory process. In Gonzales v. McEuen, *supra*, 435 F. Supp. at 468 (C.D. Cal 1977), the court stated that the school did not have a duty to produce all witnesses to an event, although it then risks the possibility of falling short of its burden of proof by not introducing sufficient testimony. *Cf. Ring v. Reorganized School District No. 3*, 609 S.W.2d 241, 243-44 (Mo. Ct. App. 1980) (where administration's witnesses were directed to appear, but witnesses requested by student were given the option to appear if they chose, no constitutional violation in light of student's failure to show possible injury from this and his having made no protest about their absence).

On the other hand, the court in Mills, *supra*, 348 F. Supp. at 883 (D.D.C. 1972), in addition to providing for confrontation and cross-examination, gave the student's parent or representative "the right to have the attendance of any public employee who may have evidence upon which the proposed action may be based...". Similarly, the consent decree approved by the court in Jordan v. School District of City of Erie, 583 F.2d 91, 99 (3d Cir. 1978) (disciplinary transfer for a period of six weeks to one year), provides that "All parties or their representative shall, at Hearing II, have the right to compel the attendance of and to question any person who has given any information to the School District relevant to the proposed transfer for disciplinary reasons."

Cf.:

- Doe v. Kenny, *supra*, C.A. No. H-76-199 (D. Conn., Oct. 12, 1976) (Consent Decree, p. 4) (Clearinghouse No. 19,358C) (student right to "require the presence of witnesses");
- Felder, *supra*, 346 F. Supp. at 730 (D. Neb. 1972) (court seemingly rules that duty on the school, not on the student, to ask persons primarily aware of the reasons for the proposed discipline to attend).

- Winters, *supra*, C.A. No. 78-75 (W.D.N.Y., May 25, 1978) (Stipulation for Entry of Judgment, p. 6) (Clearinghouse No. 24,455) ("The principal's cooperation in securing the presence of witnesses is essential.");
- Bobbi Jean M., *supra*, C.A. No. 79-576 (M.D Pa., Nov. 3, 1980) (Consent Decree, "Sample Notice," p. 2) (Clearinghouse No. 30,528B) (expulsion; "right to demand" that opposing witnesses designated by district be present at hearing for cross-examination);
- Gratton v. Winooski School District Board of Education, C.A. No. 74-86 (D. Vt. April 10, 1974) (Preliminary Injunction, p. 5) (Clearinghouse No. 45,539) (indefinite suspension; where plaintiff identifies teachers or student he or she wishes to call as a witness, "school authorities" "will assist plaintiff in any reasonable manner in arranging for the attendance of such teachers or students at the hearing");
- Hairston, *supra*, 423 F. Supp. at 185 (S.D. W. Va. 1976) (due process required for placement in special education classes would be fulfilled by implementing regulations which provide, in part, "the right to request the attendance at the hearing of any employee or agent of the county educational agency who might have testimony or evidence relevant to the needs, abilities, or status of the child");
- Racine Unified School District v. Thompson, *supra*, 321 N.W. 2d at 339-40 (Wisc. App. 1982) (under Wisconsin law, school board has authority to subpoena a witness to an expulsion hearing).

5. Presentation of The Student's Case

"The opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard."

Goldberg v. Kelly, 397 U.S. 254, 268-69, 90 S.Ct. 1011, 1021 (1970).

"The opportunity to bring witnesses to appear in his behalf may also strengthen the impact of his case above the frail impressions which a written submission would make. Particularly where credibility and veracity are at issue, ... written submissions are a wholly unsatisfactory basis for decision."

Hagopian v. Knowlton, 470 F.2d 201, 211 (2d Cir. 1972), quoting Goldberg, *supra*, 397 U.S. at 269, 90 S.Ct. at 1021 (dismissal from military academy due to excessive demerits).

In Goss v. Lopez, the Court stated that a student facing a short suspension must be given "an opportunity to present his side of the story." 419 U.S. 565, 581, 95 S.Ct. 729, 740 (1975). Although the Court stopped short of requiring,

countrywide, the opportunity to call witnesses in all short suspension hearings, the existence of a material factual dispute would seem to be the sort of "unusual situation" which could require such further procedures in order to insure a meaningful basis for a decision. *Id.*, 419 U.S. at 583-84, 95 S.Ct. at 740-41. See comments to Chapter I.C., "What Kind of Due Process" and Chapter II.A., "Suspension for Ten Days or Less." There is little reason not to hear those who have some relevant information to shed on a disciplinary situation.

In one case, Crook v. Baker, 584 F. Supp. 1531, 1556 (E.D. Mich. 1984), a district court voided a University of Michigan decision to rescind, for academic fraud, the granting of a graduate degree. The court stated (*id.* at 1556):

".... The inquisitorial, circus-like free-for-all which constituted plaintiff's hearing, as a whole, resulted in a great risk of erroneous deprivation, (even if those who heard were to have been those who decided). The lack of several specific procedural safeguards was particularly egregious, however."

The Court of Appeals for the Sixth Circuit reversed; it considered procedural safeguards to be extensive and characterized the hearing transcript as showing "simply...an informal rather than a trial-type hearing." Crook, 813 F.2d 88, 97-98 (6th Cir. 1987). It also disagreed with the lower court's holding on particular procedures. *Id.*, at 98-100.

Lower courts, particularly when dealing with long-term exclusion, have uniformly upheld the student's right to present a defense. Some of these decisions refer specifically to the right to present "witnesses or exhibits," while others merely use the term "evidence."

See:

- Hagopian, *supra*, 470 F.2d at 211 (2d Cir. 1972); ("evidence, including witnesses...");
- Wasson v. Trowbridge, 382 F.2d 807, 812 (2d Cir. 1967) (dismissal from military academy; witnesses and other evidence);
- Jordan v. School District of City of Erie, 583 F.2d 91, 98, 99 (3rd Cir. 1978) (consent decree) (disciplinary transfers for a period of six weeks to a year; evidence and witnesses, "including expert medical, psychological, or educational testimony");
- Dixon v. Alabama State Board of Education, 294 F.2d 150, 159 (5th Cir. 1961), *cert. denied*, 368 U.S. 930 (1961) (expulsion; witnesses and affidavits);
- Esteban v. Central Missouri State College, 277 F. Supp. 649, 651 (W.D. Mo. 1967), *approved*, 415 F.2d 1077 (8th Cir. 1969), *cert. denied*, 398 U.S. 965 (1970) (exclusion for two semesters; affidavits, witnesses, and exhibits);
- Gonzales v. McEuen, 435 F. Supp. 460, 467 (C.D. Cal. 1977) (expulsion for remainder of year; evidence);

- Mills v. Board of Education of District of Columbia, 348 F. Supp. 866, 883 (D.D.C. 1972) (suspension, transfer, or other exclusion from student's normal program for more than two days; evidence and testimony);
- PUSH v. Carey, C.A. Nos. 73-C-2522, 74-C-303 (N.D. Ill., Nov. 5, 1975) (Mem. Opin. and Order, pp. 9-10) (Clearinghouse No. 17,507A), *rev'd in part on other grounds sub nom. Piphus v. Carey*, 545 F.2d 30 (7th Cir. 1976) (reversed because of lower court's failure to award damages to students), *rev'd on other grounds*, 435 U.S. 247, 98 S.Ct. 1042 (1978) (reversed on damages issue) (suspensions potentially beyond 10 days; witnesses, evidence);
- Quintanilla v. Carey, C.A. No. 75-C-829 (N.D. Ill., Mar. 31, 1975) (Mem. Opin. and Order, p. 6) (Clearinghouse No. 15,369A) (transfer equivalent to permanent expulsion; witnesses);
- Mello v. School Committee of New Bedford, C.A. No. 72-1146F (D. Mass., Apr. 6, 1972) (Temporary Injunction, p. 2) (Clearinghouse No. 7,773) (any exclusions; evidence);
- Speake v. Grantham, 317 F. Supp. 1253, 1258 (S.D. Miss. 1970) (indefinite suspension; witnesses and other evidence);
- Felder v. Board of Education, 346 F. Supp. 722, 724, 731 (D. Neb. 1972) (expulsion for remainder of year; witnesses, documents, and own testimony);
- Winters v. Board of Education of City of Buffalo, C.A. No. 87-75 (W.D.N.Y., May 25, 1978) (Stipulation for Entry of Judgment, p. 6) (Clearinghouse No. 24,455) (suspension beyond five days; witnesses and other evidence);
- Givens v. Poe, 346 F. Supp. 202, 209 (W.D.N.C. 1972) (suspension "for any considerable period of time"; evidence);
- Corr v. Mattheis, 407 F. Supp. 847, 853 (D.R.I. 1976) (termination of federal financial aid; evidence);
- Hobson v. Bailey, 309 F. Supp. 1393, 1402 (W.D. Tenn. 1970) (indefinite suspension; affidavits and witnesses);
- Sullivan v. Houston Independent School District, 307 F. Supp. 1328, 1346 (S.D. Tex. 1969) (suspension for "substantial period of time"; witnesses and other evidence);
- DePrima v. Columbia-Green Community College, 89 Misc. 2d 620, 392 N.Y.S.2d 348, 350 (N.Y. Sup. Ct. 1977) (disciplinary probation; witnesses);
- Morrison v. University of Oregon Health Sciences Center, 68 Or. App. 870, 877, 685 P.2d 439, 444 (Or. App. 1984) (dismissal from graduate school; "The entire purpose of a hearing is undermined when relevant factual information is discussed and considered for the first time in a closed session without the opportunity for objection or response);
- North v. West Virginia Board of Regents, 233 S.E.2d 411, 417 (W. Va. 1977) (expulsion; "to present evidence on his [her] own behalf").

Cf.:

- Doe v. Kenny, C.A. No. H-76-199 (D. Conn., Oct. 12, 1976) (Clearinghouse No. 19,358C) (Consent Decree, p. 4) (disciplinary transfers; right to testify, present witnesses and other evidence);
- Bobbi Jean M. v. Wyoming Valley West School District, C.A. No. 79-576 (M.D. Pa., Nov. 3, 1980) (Clearinghouse No. 30,528B) (Consent Decree, "Sample Notice," p. 2) (exclusion beyond ten days; testify and produce witnesses);
- Hairston v. Drosick, 423 F. Supp. 180, 185 (S.D. W. Va. 1976) (due process required for placement in special classes would be met by implementing regulations providing, in part, "that the parties have an opportunity to present their evidence and testimony").

But see:

- Tasby v. Estes, 643 F.2d 1103, 1106 (5th Cir. 1981) (no due process violation where teacher witnesses called by students had to obtain principal's permission and student witnesses had to obtain parent's permission; no showing that any student was ever denied the presence of a necessary witness).

In Wasson v. Trowbridge, *supra*, 382 F.2d at 812 (2d Cir. 1967), the court stated that students must be allotted adequate time at the hearing to present their defense.

Compulsory Process

Under compulsory process, witnesses are required to appear if requested. There are also other methods by which a school can help to obtain the presence of requested witnesses. Any of these can be helpful when a witness with favorable testimony is either reluctant to testify or is difficult to locate. The case law on compulsory process is discussed in Chapter III.F.4.(f.), "Adverse Witnesses and Evidence."

Who Goes First?

The case against the student should be presented by the school's representative before the student has to present his/her case. This requirement is consistent with the presumption that the student is innocent. The student should be able to respond to the specific charge(s) against him/her, rather than having to mount a general defense against undetermined evidence. See Goss v. Lopez, *supra*, 419 U.S. 565, 581, 95 S.Ct. 729, 740 (1975) ("notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story"). In fact, if sufficient evidence is not presented to establish the student's wrongdoing, the student should be found innocent without having to present any evidence.

See Chapter III.F.6., "Privilege Against Self-Incrimination;" Chapter III.F.7., "Burden of Proof, Presumption of Innocence;" and Chapter III.G.1., "Findings: Determination of Misconduct."

See especially *In re DeVore*, 11 Educ. Dept. Rep. 296 (N.Y. Educ. Comm'r 1972) (quoted at length in Chapter III.F.7.) (where the student was required to come forward first at the hearing, the validity of the hearing was overturned).

6. Privilege Against Self-Incrimination

"No person ... shall be compelled in any criminal case to be a witness against himself...."

U.S. Const. amend. v.

(a.) Introduction

The privilege against self-incrimination is, of course, related to the question of the safeguards necessary to assure that admissions or confessions are reasonably trustworthy, that they are not the mere fruits of fear or coercion, but are reliable expressions of the truth. The roots of the privilege are, however, far deeper.... One of its purposes is to prevent the state, whether by force or by psychological domination, from overcoming the mind and will of the person under investigation and depriving him of the freedom to decide whether to assist the state in securing his conviction.

It would indeed be surprising if the privilege against self-incrimination were available to hardened criminals but not to children.... As Mr. Justice White, concurring, stated in *Murphy v. Waterfront Commission*, 378 U.S. 52, 94, 84 S.Ct. 1594, 1611, ... (1964):

The privilege can be claimed in *any proceeding*, be it criminal or civil, administrative or judicial, investigatory or adjudicatory. * * * it protects *any disclosures* which the witness may reasonably apprehend *could be used in a criminal prosecution or which could lead to other evidence that might be so used.* (Emphasis added [by the Court].)

* * *

Against the application to juveniles of the right to silence, it is argued that juvenile proceedings are 'civil' and not 'criminal,' and therefore the privilege should not apply. It is true that the statement of the privilege in the Fifth Amendment, which is applicable to the States by reason of the Fourteenth Amendment, is that no person 'shall be compelled in any *criminal case* to be a witness against himself.' [Emphasis added by Court.] However, it is also clear that the availability of the privilege does not turn upon the type of proceeding in which its protection is invoked, but upon the nature of the statement or admission and the exposure which it invites. The privilege may, for example, be claimed in a civil or administrative proceeding, if the statement is or may be inculpatory.

It would be entirely unrealistic to carve out of the Fifth Amendment all statements by juveniles on the ground that these cannot lead to 'criminal' involvement. In the first place, juvenile proceedings to determine 'delinquency,' which may lead to commitment to a state institution, must be regarded as 'criminal' for purposes of the privilege against self-incrimination.... And our Constitution guarantees that no person shall be 'compelled' to be a witness against himself when he is threatened with deprivation of his liberty -- a command which this Court has broadly applied and generously implemented in accordance with the teaching of the history of the privilege and its great office in mankind's battle for freedom.

In addition, ... there is little or no assurance ... that a juvenile apprehended and interrogated by the police or even by the Juvenile Court itself will remain outside of the reach of adult courts as a consequence of the offense for which he has been taken into custody.

[I]t seems probable that where children are induced to confess by 'paternal' urgings on the part of officials and the confession is then followed by disciplinary action, the child's reaction is likely to be hostile and adverse -- the child may well feel that he has been led or tricked into confession and that despite his confession, he is being punished.

Further, authoritative opinion has cast formidable doubt upon the reliability and trustworthiness of 'confessions' by children.

In re Gault, 387 U.S. 1, 47-52, 87 S.Ct. 1428, 1454-56 (1967) (footnotes omitted).

This Court has been asked to rule on the question of whether the refusal of a student to testify before a school board in a matter involving charges against him for violation of Policy 5131 [possession of marijuana] can be used against him as an admission of guilt.

The Court holds that one cannot be denied his Fifth Amendment right to remain silent merely because he is a student. Further, his silence shall under no circumstances be used against him as an admission of guilt.

... The considerations of age must also be weighed, with greater protections being afforded children due to their youth.

Caldwell v. Cannady, 340 F. Supp. 835, 840-41 (N.D. Tex. 1972) (expulsion for remainder of semester).

For additional Supreme Court pronouncements on the privilege against self-incrimination, generally, see Griffin v. California, 380 U.S. 609, 613-14, 85 S.Ct. 1229, 1232-33 (1965); Murphy v. Waterfront Commission, 378 U.S. 52, 55, 84 S.Ct. 1594, 1596-97 (1964).

(b.) Legal Bases for Applying the Privilege in Schools

First, *In re Gault*, *supra*, 387 U.S. 1, 87 S.Ct. 1428 (1967), reinforced the rule that a person may exercise the fifth amendment right to remain silent in an administrative proceeding, such as a school disciplinary proceeding, where he or she *reasonably believes that his or her testimony might be used against him or her in a later criminal or juvenile proceeding*. This provides one explanation of the holding in *Caldwell*, *supra*, 340 F. Supp. at 840-41 (N.D. Tex. 1972). See also *Adibi-Sadeh v. Bee County College*, 454 F. Supp. 552, 556 (S.D. Tex. 1978) ("The others refused to testify at the individual [discipline] hearings, electing instead to assert their Fifth Amendment right against self-incrimination because of pending criminal trespass charges which had been filed against them."). This doctrine has also been applied by the Supreme Court to other administrative proceedings. See, e.g., *Lefkowitz v. Cunningham*, 431 U.S. 801, 804-05, 97 S.Ct. 2132, 2135 (1977) (removal of political party officer); *Spevack v. Klein*, 385 U.S. 511, 87 S.Ct. 625 (1967) (disbarment proceedings); *Murphy v. Waterfront Commission*, *supra*, 378 U.S. 52, 84 S.Ct. 1594 (1964) (commission hearing).

Second, the fifth amendment is applicable to civil or administrative proceedings if they are basically equivalent to or their sanctions are as severe as criminal proceedings, as in *In re Gault*. See *Gonzalez v. McEuen*, 435 F. Supp. 460, 470-71 (C.D. Cal. 1977), where, following *Caldwell*, the court held that the privilege against self-incrimination applied in a school disciplinary hearing for misconduct (*which apparently was not going to lead to later criminal proceedings*). The court stated, "There is no question that a high school student who is punished by expulsion [for remainder of year] might well suffer more injury than one convicted of a criminal offense."

In *Allen v. Illinois*, 478 U.S. 364, 106 S.Ct. 2988 (1986), the Supreme Court addressed the issue implicitly decided in *Caldwell* and *Gonzales* -- the meaning of the Fifth Amendment reference to "any criminal case." *Allen* concerned proceedings under the Illinois Sexually Dangerous Persons Act, allowing long-term commitments of offenders. A five-person majority held that these proceedings "were not 'criminal' within the meaning of the Fifth Amendment...." *Id.*, 478 U.S. at 375, 106 S.Ct. at 2995. The key language of the majority opinion was as follows (*id.*, 478 U.S. at 370, 106 S.Ct. at 2995):

In short, the State has disavowed any interest in punishment, provided for the treatment of those it commits, and established a system under which committed persons may be released after the briefest time in confinement. The Act thus does not appear to promote either of the 'traditional aims of punishment-retribution and deterrence.' (citations omitted)

The minority in *Allen*, focusing on the lengthy possible confinement and "the heavy reliance on the criminal justice system," concluded "that the proceeding must be considered 'criminal' for purposes of the Fifth Amendment." *Id.*, 478 U.S. at 379, 106 S.Ct. at 2997.

The rationale of the majority in Allen provides some support for the results in Caldwell and Gonzales. School districts typically do not offer services or other "treatment" to expelled students. Their goal is "retribution and deterrence."

On the other hand, Baxter v. Palmigiano, 425 U.S. 308, 96 S.Ct. 1551 (1976) raises questions about the Caldwell and Gonzales holdings. In Baxter, Rhode Island rules for prison disciplinary proceedings allowed an inmate "to remain silent," but provided that "his silence would be held against him" in the discipline hearing. The Court found no violation of the privilege against self-incrimination, stating: "Prison disciplinary hearings are not criminal proceedings;..." *Id.*, 425 U.S. at 316, 317, 318, 96 S.Ct. at 1557-58. The Court added that silence did not produce an automatic guilty finding and "was given no more evidentiary value than was warranted by the facts surrounding [the] case." *Id.*, 425 U.S. at 317-18, 96 S.Ct. at 1557-58.

In Morale v. Grigel, 422 F. Supp. 988, 1003 (D.N.H. 1976) (long-term suspension from public vocational school), the Court followed Baxter, ruling that reliance on silence "as one factor pointing toward a guilty finding" violated neither the privilege, nor due process of law. See also Picozzi v. Sandalow, 623 F. Supp. 1571, 1582 (E.D. Mich. 1986) (a hearing to address a student's reenrollment in law school would be "a civil proceeding" rather than a "criminal case" within the meaning of the Fifth Amendment; therefore, the fact that plaintiff's refusal to take a polygraph test "might be used at the administrative hearing as evidence that he set [a] fire does not threaten his privilege"); and Birdsey v. Grand Blanc Community School, 344 N.W. 2d 342, 344 (Mich. App. 1983) (expulsion; "...evidentiary hearing conducted in this case was civil and not criminal in nature..."; Miranda warning not required).

Finally, the use of an accused student's compelled testimony, if seen to deny fundamental fairness or to create too large a risk of untrustworthiness, may be a violation of the due process clause even in situations where the fifth amendment itself is not applicable. Goldwyn v. Allen, 54 Misc. 2d 94, 281 N.Y.S.2d 899 (N.Y. Sup. Ct. 1967) (withdrawal of New York State Regents Examination privileges for one year based on student's confession of cheating, which was later recanted; "...[T]his court questions the efficacy of the statements elicited from infant petitioner since it appears from the papers presented that the investigation conducted after infant petitioner's initial explanation was intended to disprove the statement which the school authorities found not credible."). The portion of the Baxter opinion, *supra*, noting the limited weight given silence, may be deemed to embody a general due process concern, independent of the privilege against self-incrimination. See Morale v. Grigel, *supra*, 422 F. Supp. at 1003 (reliance on silence did not constitute a due process violation). Compare Suzuki v. Alba, 438 F. Supp. 1106, 1111-12 & n.13 (D. Ha. 1977) (civil commitment to a psychiatric facility; privilege applicable; "In the instant case, one's silence is not used for evidentiary purposes, but is used as a justification for hospitalization when there is otherwise insufficient evidence for commitment").

(c.) Implications of the Privilege -- Silence Not Basis for Punishment

The fifth amendment protects a person from being compelled to testify against himself or herself. If the government imposes a serious penalty for refusal to testify, then it has introduced a form of compulsion. Thus, in situations in which a person has a right to exercise a Fifth Amendment privilege, several decisions have held that exercising that privilege and remaining silent cannot be a basis for punishment or be taken as an admission of guilt in the administrative proceeding.

See:

- Lefkowitz, *supra*, 431 U.S. at 805-06, 97 S.Ct. at 2135-36 (1977) (removal of political party officer);
- Spevack, *supra*, 385 U.S. at 514-16, 87 S.Ct. at 628 (1967) (disbarment proceeding);
- Gonzales, *supra*, 435 F. Supp. at 471 (C.D. Cal. 1977) ("The court holds that comment by counsel on the students' refusal to testify, and arguments that guilt could be inferred from such refusal was a violation of the students Fifth Amendment rights");
- Caldwell, *supra*, 340 F. Supp. at 840-41 (N.D. Tex. 1972) (expulsion for remainder of semester);
- In re DeVore, 11 Educ. Dept. Rep. 296 (N.Y.S. Educ. Comm'r 1972) (indefinite suspension overturned where superintendent based his decision on student's choosing to remain silent; violation of school's obligation to come forward with sufficient evidence and of student's right to a presumption of innocence) (quoted at length in Chapter III.F.7., "Burden of Proof, Presumption of Innocence").

But see decisions finding a disciplinary decision not to be a "criminal case" for Fifth Amendment purposes:

- Picozzi v. Sandalow, *supra*, 623 F. Supp. at 1581-82 (E.D. Mich. 1986) (alternative holding; "...refusal would have virtually no probative value...");
- Morale v. Grigel, *supra*, 422 F. Supp. at 1003 (D.N.H. 1976) (appropriate use made of silence in disciplinary proceeding).

Compare:

- Adibi-Sadeh v. Bee County College, *supra*, 454 F. Supp. at 558 (S.D. Tex. 1978) (where students who face criminal charges assert privilege in college disciplinary proceeding they can not also "[prevent] the Committee from considering the evidence before it").

The issues here are connected to the requirement that the burden of proof be placed on the school and that the student not be punished unless sufficient evidence has been introduced to conclude that he/she is guilty. See Chapter III.F.7. (Including In re DeVore) and Chapter III.G.1.

(d.) "Miranda Warnings"

The question of the applicability of "Miranda warnings" in schools [see Miranda v. Arizona, 384 U.S. 436, 478-79, 86 S.Ct. 1602, 1630 (1966)] has been raised frequently, with a student successful only once.

See:

- Commonwealth v. A Juvenile, No. 8909 JV 55, District Court Department, Brookline Division, Massachusetts, Order on Motion to Suppress, December 22, 1989 (Clearinghouse No. 45,538) (allowing motion to suppress statement made by juvenile to school principal who was investigating vandalism incident; "...Miranda-type warnings are required in Massachusetts in the case of custodial-type interrogations of students in the public schools"; the principal "saw his role as that of aiding the police or at least establishing a foundation for referral of the problem to the police").

But see:

- Betts v. Board of Education of City of Chicago, 466 F. 2d 629, 631 & n.1 (7th Cir. 1972) (disciplinary transfer; "Miranda warnings" not required);
- Buttney v. Smiley, 281 F. Supp. 280, 287 (D. Colo. 1968) (suspension; university not required to inform student of his right to remain silent);
- Boynton v. Casey, 543 F. Supp. 995, 997-98 (D. Me. 1982) (suspension and expulsion; student has no right to be advised of the right to remain silent);
- Pollnow v. Glennon, 594 F. Supp. 220, 224 (S.D.N.Y. 1984) (indefinite suspension; school is not required to tell student of the right to call a parent or to remain silent at initial, informal meeting, i.e., no Miranda-type warning is necessary);
- Adams v. City of Dothan, 485 So. 2d 757, 761-62 (Ala. Civ. App. 1986) (expulsion; Miranda warnings not required);
- Adams v. School Board of Brevard County, 470 So. 2d 760, 762 n.2 (Fla. App. 1985) (expulsion for remainder of year and summer session; Miranda "has not been extended to a student questioned by school officials in furtherance of their disciplinary duties");
- Birdsey v. Grand Blanc Community Schools, 344 N.W. 2d 342, 344 (Mich. App. 1983) (expulsion; "a statement taken without benefit of Miranda warnings is not barred from evidence in a civil proceeding");

- State v. Wolfer, 693 P. 2d 154, 158-59 (Wash. App. 1984) (conviction in juvenile court of possession of stolen property; school security personnel need not give Miranda warning).

(e.) Disciplinary Hearing While Criminal Charges are Pending

Courts have been unsympathetic to students seeking to stay disciplinary hearings until pending criminal charges are resolved. In Pollnow v. Glennon, *supra*, 594 F. Supp. 220, 224 (S.D.N.Y. 1984), the court rejected plaintiff's argument:

Finally, as to the Pollnow's [sic] claim of impropriety in holding a § 3214 hearing while criminal charges involving the same conduct are pending, the Courts have long held this to be permissible. Matter of Manigaulte, 63 Misc. 2d 765, 313 N.Y.S.2d 322 (1970), and Matter of Johnson v. Board of Education, 62 Misc. 2d 929 [at 933], 310 N.Y.S.2d 429 [at 429] (1970), where the Court stated:

[I]f the petitioners' contentions were carried to their logical conclusion, it would result in the absurd situation wherein a student who violated a rule or regulation short of the commission of a crime could be suspended after a hearing for a period of greater than five days, while one who committed a serious crime on school property, be it assault, arson, attempted murder, etc., could not be suspended for more than five days and would be entitled to attend school until there was a disposition of the criminal charges. Such a situation cannot be condoned....

See also:

- Wimmer v. Lehman, 705 F. 2d 1402, 1406-07 (4th Cir. 1983) (discharge from Naval Academy and transfer to active duty status; due process did not require postponement of disciplinary hearing until after criminal proceedings based on same incident; plaintiff had the right to remain silent in the disciplinary proceeding);
- Hart, *supra*, 557 F. Supp. 1379, 1384-85 (W.D. Mich. 1983) (constitution does not require postponement of disciplinary hearing; citing other decisions).

Compare:

- Gabrilowitz v. Newman, 582 F.2d 100 (1st Cir. 1978), where a student was faced with having to decide whether to testify at his disciplinary hearing, which occurred while criminal charges were pending concerning the same incident. The court held that, if the student testified, the fifth amendment would not bar the later use of his testimony in the criminal proceedings because he was not being "compelled" to testify at the

disciplinary hearing. The court reached this conclusion only after determining that the university's policies guaranteed that the decision would be based only on the evidence presented even if the student remained silent, and that there was no evidence that the hearing panel would give weight to his silence. The court held that the student had the right to counsel to help him make the decision;

- McLaughlin v. Massachusetts Maritime Academy, 564 F. Supp. 809 (D. Mass. 1983) (dismissal from Academy for nonacademic violations; cadet did not have "a lawyer of his own choice with whom to consult and advise," despite pendency of criminal charges; following Gabrilowitz);
- Smith v. Little Rock School District, 582 F. Supp. 159, 161 (E.D. Ark. 1984) (expulsion for remainder of semester; rule allowing school to take disciplinary action for off-campus conduct would be meaningless if school authorities were forced to await outcome of criminal proceeding).

(f.) Related Issue -- Student Interrogation Outside of Hearings

Issues of self-incrimination and privilege in schools are not limited to questioning at the hearing itself. They can extend to questioning at other times by school officials and by police. See §IV.C., "Police in Schools;" §IV.E., "Collection of Information About Students;" §IV.G., "Privileged Communications," in the Center's 1982 manual *School Discipline and Student Rights*.

7. Burden of Proof and Presumption of Innocence

"Defendants shall bear the burden of proof as to all facts and as to the appropriateness of any disposition and of the alternative educational opportunity to be provided during any suspension."

Mills v. Board of Education, 348 F. Supp. 866, 882 (D.D.C. 1972) (suspension, transfer, or other exclusion from student's normal program for more than two days).

The burden of proving the student's guilt rests on the school officials who seek to exclude or otherwise discipline the student. The student is presumed to be innocent and cannot face sanction unless the school proves the case against him/her. Thus, Goss v. Lopez, *supra*, 419 U.S. at 581, 95 S.Ct. at 740, describes the hearing in the case of a "usual" short suspension, in part as follows: "...the student [is] given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story" (emphasis added). The following excerpt from In re

DeVore, 11 Educ. Dept. Rep. 296 (N.Y. Educ. Comm'r 1972), clearly allocates the burden of proof to the school.

Raymond DeVore was indefinitely suspended from school.... The basis for the suspension was the fact that Raymond DeVore had been 'arrested' for an alleged offense involving possession of dangerous drugs. A hearing was offered the student by the superintendent, but no charges were filed or served. Further, no evidence was introduced by the school officials at the hearing. The decision to suspend was made solely on the basis of the arrest and upon the student's refusal to answer Superintendent Friot's question as to whether he had ever possessed drugs in school. The student refused to answer questions on possible drug use based upon his counsel's warning that he had a right not to answer questions which might incriminate him both in the administrative proceeding and at a possible subsequent criminal trial.

It is apparent from a reading of the transcript that the superintendent of schools misconceived his role as a hearing officer under Education Law § 3214(3)(c). This misconception is best characterized in the following colloquy between the superintendent and petitioner's counsel.

Mr. Manak: Now at a hearing ordinarily the burden is on the school to go forward with some evidence.

Dr. Friot: Well, now this is not a prosecution. This is a hearing. The law says you are entitled to be heard. You now have your opportunity to be heard. So?

Section 3214(3)(c) requires that a student be given an opportunity for a full evidentiary hearing before he may be suspended from school for more than five days. Although the proceeding is administrative, it is nevertheless an adversary proceeding, and the responsibility for establishing that the student is guilty of misconduct rests with the complaining school officials. In Matter of Port (9 Educ. Dept. Rep. 107 ([N.Y. Educ. Comm'r] 1970), I noted:

Before a pupil may be disciplined, whether it be by expulsion, suspension or curtailment of privileges, two essential elements must be present. There must be some conduct which serves as the predicate for the imposition of discipline and there must be a reasonable degree of certainty that the pupil was the perpetrator of, or otherwise participated in, such conduct.

It is clear that the responsibility for establishing both elements in a disciplinary situation rests with the school officials. It is equally well settled that the student must be afforded the basic presumption of innocence or wrongdoing until his guilt has been established by direct, competent evidence of misconduct (Matter of Rodriguez, 8 Educ. Dept. Rep. 214 ([N.Y. Educ. Comm'r] 1969);

Matter of Rose, 10 [Educ. Dept. Rep.] 49 ([N.Y. Educ. Comm'r] 1970); Matter of Watson, 10 [Educ. Dept. Rep.] 90 ([N.Y. Educ. Comm'r] 1971)).

See also:

- Jackson v. Hayakawa, 761 F.2d 525, 527 (9th Cir. 1985) (reprimands, probations, and expulsions; "No disciplinary action could be taken on grounds which were not supported by substantial evidence. Defendants presented no evidence to show that the students individually committed disorderly acts."; emphasis added).

Cf.:

- John A. v. San Bernardino Unified School District, 33 Cal. 3d 301, 307, 654 P.2d 242, 246, 187 Cal. Rptr. 472, 476 (Cal. 1982) (expulsion; "The [statute's] requirement that the board's decision to expel be supported by a preponderance of the evidence establishes that the burden is on the school district to establish cause for expulsion").

Compare:

- Schaill v. Tippecanoe County School Corp., 864 F.2d 1309, 1323-24 (8th Cir. 1988) (random drug testing program for participants in high school interscholastic athletics; when two tests yield positive results, student thereafter has the burden of proving results erroneous; no due process violation).

Mills and DeVore, *supra*, and the cases cited therein are among the few cases to address the issue of presumption of innocence explicitly. See also Matter of Chitty, 12 Educ. Dep. Rep. 282 (N.Y. Educ. Comm'r 1973). Nevertheless, all the cases dealing with the degree of evidence necessary (see §XI.G.1., "Determination of Misconduct," in the Center's 1982 manual *School Discipline and Student Rights*) implicitly assume that the burden is on those who are accusing the student, despite the differences as to the degree of that burden. Also note that the court in Dixon v. Alabama State Board of Education, 294 F.2d 150, 158 (5th Cir. 1961), *cert. denied*, 368 U.S. 930 (1961), stated: "The notice should contain a statement of the specific charges and grounds which, *if proven*, would justify expulsion under the regulations of the Board of Education." (Emphasis added.) In St. Ann v. Palisi, 495 F.2d 423, 425 (5th Cir. 1974), in which the court held that students were wrongfully punished for the conduct of their parent, the court stated: "Freedom from punishment in the absence of *personal* guilt is a fundamental concept in the American scheme of justice. In order to intrude upon this fundamental liberty governments must satisfy a substantial burden of justification." (Emphasis in original.)

In Giles v. Redfern, C.A. No. ___ (N.H. Super. Ct., Cheshire County, Jan. 18, 1977) (Decree, pp. 3-4, 15-16) (Clearinghouse No. 20,624) (suspension for remainder of semester), the court found a denial of due process, in part because the dean resolved a conflict in the hearing testimony between the accused student's version and a student security officer's version by relying on "the

principle of the *prima facie* nature of the testimony of a law (security) officer." To this logic, the court replied, "While this 'principle' has wide currency in many totalitarian countries, the court is not aware of its existence as a principle of Anglo-Saxon law."

Cf.:

- Newsome v. Batavia Local School District, 842 F.2d 920, 927 (6th Cir. 1988) (expulsion; burden on school officials to inform student of evidence so student will have opportunity to rebut).

As the opinion in DeVore, *supra*, 11 Educ. Dept. Rep. 296 (N.Y. Educ. Comm'r 1972), demonstrates, the allocation of the burden of proof and the presumption of innocence are related to certain other procedural requirements. First, the presumption of innocence allows the student to remain silent if he/she chooses, in light of the requirement that the school must submit sufficient evidence of guilt. See Chapter III.F.6., "Privilege Against Self-Incrimination;" and Chapter III.G.1., "Determination of Misconduct." Second, placing the burden on the school means that the person presenting the case against the student must come forward first. See "Who Goes First?" in Chapter III.F.5., "Presentation of the Student's Case." If sufficient evidence against the student has not been presented, the case should be dismissed, without the student having to rebut the school's evidence and present evidence to prove his/her innocence.

8. Rules of Evidence

"Plaintiffs and their counsel... may object to the admission of any testimony or evidence."

Speake v. Grantham, 317 F. Supp. 1253, 1258 (S.D. Miss. 1970) (indefinite suspension).

However, courts have adhered to the belief that school administrators should not be required to learn the rules of evidence since other procedural safeguards are thought to work to ensure a fair hearing. Thus, arguments from excluded students that formal rules of evidence were not followed will generally receive little attention from the courts. As one court stated:

There is a seductive quality to the argument -- advanced here to justify the importation of technical rules of evidence into administrative hearings conducted by laymen -- that since a free public education is a thing of great value, comparable to that of welfare sustenance or the curtailed liberty of a prisoner, the safeguards applicable to these should apply to it.... In this view we stand but a step away from the application of the *strictissimi juris* due process requirements of criminal trials to high school

disciplinary processes. And if to high school, why not to elementary school. It will not do.

• • •

Basic fairness and integrity of the fact-finding process are the guiding stars. Important as they are, the rights at stake in a school disciplinary hearing may be fairly determined upon the 'hearsay' evidence of school administrators charged with the duty of investigating the incidents. We decline to place upon a board of laymen the duty of observing and applying the common-law rules of evidence.

Boykins v. Fairfield Board of Education, 492 F.2d 697, 701 (5th Cir. 1974).

Accord:

- Brewer v. Austin Independent School District, 779 F.2d 260, 263 (5th Cir. 1985) (suspension for remainder of school year; "we reject any suggestion that the technicalities of criminal procedure ought to be transported into school suspension cases");
- Newsome v. Batavia Local School District, 842 F.2d 920, 926 (6th Cir. 1988) (expulsion; school administrators are not required to know or follow common law rules of evidence);
- Nash v. Auburn University, 812 F.2d 655, 665-66 (11th Cir. 1987) (suspensions for cheating; "...student disciplinary hearings...need not conform to formal rule of evidence"; noting also that evidence in question would have been admissible under Federal Rules of Evidence);
- Sykes v. Sweeney, 638 F. Supp. 274, 279 (E.D. Mo. 1986) (expulsion; formal procedures and rules of evidence are not required in student disciplinary proceedings);
- Racine Unified School District v. Thompson, 107 Wis. 2d 657, 664, 321 N.W.2d 334, 337-38 (Wis. Ct. App. 1982) (expulsion; "We are persuaded ... that the hearsay statements from schoolteachers or staff members were admissible. We agree ... that a lay board cannot be expected to observe the niceties of the hearsay rule. Moreover, in the absence of an allegation of bias, we can conceive of no reason why school staff would fabricate or misrepresent statements of this sort. Such statements, then, have sufficient probative force upon which to base, in part, an expulsion").

See also:

- In re Appeal of McClellan, 82 Pa. Commw. 75, 475 A.2d 867 (Pa. Commw. Ct. 1984) (twenty-four day suspension; under governing statute, board is not bound by technical rules of evidence and may consider all evidence that is relevant and of "reasonably probative value").

(a.) General Standard for Admission of Evidence

Agencies may admit any relevant evidence, except that they shall observe the rules of privilege recognized by law. A finding may be supported by the kind of evidence on which responsible persons are accustomed to rely in serious affairs, whether or not the evidence would be admissible before a jury. Agencies may exclude evidence which is irrelevant, cumulative, or lacking in substantial probative effect.

K.C. Davis, Administrative Law Treatise § 14.06 (1958).

The formulation in Davis's treatise is often cited as a standard for hearings before administrative agencies. *See, for example*, the Massachusetts Administrative Procedure Act, Mass. Gen. L. ch. 30A, §11(2). It eliminates the need for hearing officers to become experts in, for example, all the facets of the hearsay rule and its exceptions.

See:

- Crook v. Baker, 813 F.2d 88, 99 (6th Cir. 1987) (revocation of degree; reliance on hearsay evidence does not violate due process; further, court would not consider argument since no objection was made);
- Brands v. Sheldon Community School, 671 F. Supp. 627, 632 (N.D. Iowa 1987) (exclusion from extracurricular activities; hearsay is admissible in school board proceeding);
- Adams v. School Board of Brevard County, 470 So. 2d 760 (Fla. Dist. Ct. App. 1985) (expulsion of five students for remainder of school year and summer session; hearsay evidence is admissible to support a finding of fact so long as there is other competent evidence).

Nevertheless, some courts hold that the right of confrontation prohibits school disciplinary tribunals from considering statements against the student made by witnesses who are not present at the hearing for questioning by the student/ parent. *See* cases cited in Chapter III.F.4.(d),(e), "Adverse Witnesses and Evidence."

Statutes or rules may establish "rules of evidence" applicable to a particular proceeding.

See:

- John A. v. San Bernardino City Unified School District, 654 P.2d 242, 246 (Cal. 1982) (expulsion; sole reliance on witness statements was violative of statutory requirement that evidence be of "the kind...upon which reasonable persons are accustomed to rely in the conduct of serious affairs");

- Morrison v. University of Oregon Health Services Center, 685 P.2d 439, 441, 443-44 (Or. App. 1984 (academic dismissal from dental school; panel violated statutory standard and "student guide" by considering during deliberations evidence outside the hearing record)).

(b.) Hearing Confined to the Charges

Allowing the consideration of evidence unrelated to the charges in the notice would violate the student's legal right to adequate notice of the charges and an opportunity to defend against them. See the cases cited in Chapter III.B., "Notice." See also DeJesus v. Penberthy, 344 F. Supp. 70, 76-77 (D. Conn. 1972), where an expulsion was overturned because the school board considered evidence on a charge which was different from that contained in the notice and which might have been the basis for the school board's decision. Finally, as discussed in Chapter III.G.1., "Determination of Misconduct," the findings must be confined to the charges contained in the notice, and this requirement would be threatened by the admission of evidence which did not relate to those charges.

(c.) Exclusion of Improperly Acquired Evidence

As the following citations show, significant factors in considering the applicability of the exclusionary rule in the educational context are (1) who conducts the search, *e.g.*, a school or police official, (2) where it is proposed to use evidence, *e.g.*, in a disciplinary hearing, juvenile court, or criminal court, and (3) the possible deterrent effect of invoking the rule.

Two courts held the exclusionary rule to be applicable to school disciplinary proceedings, explaining as follows.

"The combined effect of Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 89 S.Ct. 733 (1969) and Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022 (1971) prohibits the consideration by a school board of evidence obtained in violation of Fourth Amendment rights."

Caldwell v. Cannady, 340 F. Supp. 835, 839 (N.D. Tex. 1972).

The final problem is whether an exclusionary rule applies in this case.... The court might hold that the evidence seized from Smith's room by the College authorities, although seized in violation of his constitutional right of privacy, was admissible in the College

disciplinary hearing whether or not it would be admissible in a formal criminal proceeding.

• • •

In United States v. Calandra, [414 U.S. 338, 94 S.Ct. 613 (1974)], the Court stated that the exclusionary rule is a judicially-created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved.' 414 U.S. at 348, 94 S.Ct. at 620. To determine whether the exclusionary rule applies in a given case, it is necessary to weigh the injury to governmental interests and institutions against the potential benefits of the application of the rule. *Id.* at 349, 94 S.Ct. [at] 613....

If there were no exclusionary rule in this case, the College authorities would have no incentive to respect the privacy of its students. Students do not normally have the means to maintain a protracted damage action. In addition, those whose rights are violated cannot recover damages except from those who acted in bad faith [i.e., who knew or should have known that such actions were illegal]. See Wood v. Strickland, 420 U.S. 308, 95 S.Ct. 992 (1975). Where, as here, the authorities who violated the Constitution were not demonstrably guilty of bad faith, the exclusionary rule remains the only possible deterrent, the only effective way to positively encourage respect for the constitutional guarantee....

In this case, the court has found that Smith is in the same position as a criminal defendant; proof that the college regulation has been violated requires proof that the criminal law has been violated; and the punishment in fact imposed by the College is more severe than that likely to be imposed by any state or federal court for the same offense. It would thus be anomalous here, too, not to apply the exclusionary rule.

The application of an exclusionary rule to College disciplinary hearings where the College authorities have seized evidence in violation of Fourth Amendment rights will preserve the integrity and thus the legitimacy of the College as the maker and enforcer of regulations. Institutions which enforce the law should not infringe upon fundamental constitutional rights in doing so.... '[T]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.' Shelton v. Tucker, 364 U.S. 479, 487, 81 S.Ct. 247, 251 (1960). (Emphasis added [by the court].)

The court concludes that the evidence seized in the illegal search of Smith's room could not be used against him in the College disciplinary proceedings. Accordingly, the College must retry him, without the evidence, or dismiss the charges.

Smyth v. Lubbers, 398 F. Supp. 777, 793-95
(W.D. Mich. 1975) (suspension or expulsion).

The same result was reached in Jones v. Latexo Independent School District, 499 F. Supp. 223, 237-39 (E.D. Tex. 1980). The court found that the results of school officials' unconstitutional search of students must be excluded from their school disciplinary proceedings in order to serve as a deterrent to such illegal conduct. Because all the evidence against the students resulted from the search, their suspensions and subsequent grade reductions were overturned.

But see:

- Morale v. Grigel, 422 F. Supp. 988, 999-1001 (D.N.H. 1976) (suspension for semester; rule not applicable);
- Ekelund v. Secretary of Commerce, 418 F. Supp. 102, 106 (E.D.N.Y. 1976) (dismissal from merchant marine academy; rule not applicable);
- Gordon J. v. Santa Ana Unified School District, 208 Cal. Rptr. 657 (Cal. App. 4 Dist. 1984) (suspension of high school student for a year for marijuana possession following search by vice principal based upon vague, stale information; "...the exclusionary rule is fully available in criminal prosecutions and juvenile proceedings with respect to evidence illegally obtained by school officials..."; "...we hold the exclusionary rule inapplicable in high school disciplinary proceedings..."; implying, however, that there might be circumstances where the rule should apply, for example, in the case of an unlawful search of an entire student body).

Other decisions involving school searches are as follows:

Rule Applicable:

- State v. Trippe, 146 Ga. App. 210, 246 S.E.2d 122 (Ga. Ct. App. 1978) (excluding from criminal prosecution evidence obtained by school's chief security officer, who was also deputized by county, in search requested by the school's dean; State v. Young, *infra*, distinguished on grounds that the search was conducted by law enforcement officer);
- State v. Mora, 307 So. 2d 317 (La. 1975) (the exclusionary rule does apply to the use of evidence obtained in a search by school officials in a criminal proceeding);
- People v. Scott D., 34 N.Y.2d 483, 315 N.E. 2d 466, 469, 358 N.Y.S.2d 403 (N.Y. 1974) (teacher's search of student without sufficient cause required suppression of evidence in youthful offender proceedings);
- State v. Walker, 19 Or. App. 420, 528 P.2d 113 (Or. Ct. App. 1974) (criminal charge; exclusionary rule applies to searches by "state and municipal officers"; an assistant principal is "a public official"; case remanded for development of proper record to decide issue);
- In the Interest of L.L., 90 Wis. 2d 585, 592, 280 N.W.2d 343, 346-47 (Wis. Ct. App. 1979) (exclusionary rule applies to search by teacher when evidence is used in juvenile delinquency proceedings; particular search was lawful);

- Waters v. U.S., 311 A.2d 835 (D.C. 1973) (excluding use in criminal trial of evidence obtained in search by police officer working in concert with school official).

Rule Not Applicable:

- State v. Young, 234 Ga. 488, 216 S.E.2d 586 (Ga. 1975) (criminal conviction; exclusionary rule applies only to searches by law enforcement officers and not to searches by school officials, as here);
- Commonwealth v. Dingfelt, 227 Pa. Super. 380, 323 A.2d 145 (Pa. Super. Ct. 1974) (criminal conviction; search by school official was reasonable; moreover, they are viewed as "private persons").

Ekelund and Morale, *supra*, rely in part on United States v. Janis, 428 U.S. 433, 96 S.Ct. 3021 (1976), where the Court held that the exclusionary rule would not be extended to forbid the use in the civil proceeding of one sovereign (here a tax proceeding by the federal government) of evidence seized by a criminal law enforcement agent of another sovereign (here the state government), where the latter acted in good faith reliance on a warrant (later proved defective) in conducting the seizure and there was no showing that the former participated in the illegality. This holding, which Jones v. Latexo Ind. Sch. Dist., *supra*, carefully distinguishes, was based largely on the conclusion that exclusion in such circumstances would have little deterrent effect. Thus, it does not speak directly to use in a school disciplinary hearing of evidence improperly obtained by school officials, or of evidence improperly obtained by local police officials who have a cooperative relationship with school officials and are agents of the same sovereign. In either of these cases, as the reasoning in Smyth and Jones indicates, the valuable deterrent effect of an exclusionary rule would be quite strong.

In I.N.S. v. Lopez-Mendoza, 468 U.S. 1032, 104 S.Ct. 3479 (1984), in a 5 to 4 decision invoking the standard set forth in Janis, the Supreme Court refused to apply the exclusionary rule to a civil deportation hearing. However, four of the five member majority noted that the case was not marked by "widespread [violations]" or "egregious violations of Fourth Amendment or other liberties that might transgress notions of fundamental fairness and undermine the probative value of the evidence obtained." *Id.*, 468 U.S. at 1050-51, 104 S.Ct. at 3489; footnote and citation omitted. Thus, the Supreme Court, like the California appellate court in Gordon J., *supra*, suggested that in some circumstances, the exclusionary rule might apply in a "civil" context.

The Supreme Court has established "good faith" exceptions to the application of the exclusionary rule. In United States v. Leon, 468 U.S. 897, 104 S.Ct. 3405 (1984), the Court held that the rule does "not...bar the use in the prosecution's case in chief of evidence obtained by officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be unsupported by probable cause." In Illinois v. Krull, 107 S.Ct. 1160 (1987), the Court established a similar rule where "officers act in objectively reasonable reliance upon a statute authorizing warrantless administrative search,...where the statute is ultimately found to violate the Fourth Amendment" (emphasis in original).

In New Jersey v. T.L.O., 469 U.S. 325, 340, 105 S.Ct. 733, 742 (1985), the Court held "that school officials need not obtain a warrant before searching a student who is under their authority." The Court did not address either a school search by police, or one "conducted by school officials in conjunction with or at the behest of law enforcement agencies...." *Id.*, 469 U.S. 341 n.7, 105 S.Ct. 743 n.7. Therefore, any applicability of Leon and Krull in schools would appear to depend upon there being a police search, or, ultimately, the application of similar rules when school officials act jointly with police, or at their behest.

See also:

- PA. Steel Foundry and Machine v. Secretary of Labor, 831 F.2d 1211, 1219-20 (3d Cir. 1987) (exclusionary rule not applicable to OSHA proceeding "when the only procedural defect was obtaining an ex parte warrant before a regulation permitting its use was promulgated"; footnote omitted);
- Smith Steel Casting Co. v. Brock, 800 F.2d 1329, 1334 (5th Cir. 1986) ("...exclusionary rule does not extend to OSHA enforcement actions for purposes of correcting violations of occupational safety and health standards" but does apply "where the object is to assess penalties against the employer for past violations of OSHA regulation" unless "under the reasoning announced in Leon, the good faith exception can be applied...");
- Arguelles-Vasquez v. I.N.S., 786 F.2d 1433, 1435 (9th Cir. 1986) (2 to 1) (stopping of person solely on basis of Hispanic appearance is "an egregious violation of the fourth amendment requiring suppression of any evidence obtained through the stop" in a deportation proceeding; footnote omitted);
- Garrett v. Lehman, 751 F.2d 997, 1002-05 (9th Cir. 1985) (exclusionary rule not applicable to military administrative discharge proceedings);
- Savina Home Industries v. Secretary of Labor, 594 F.2d 1358 (10th Cir. 1979) (application of exclusionary rule to administrative proceedings stemming from occupational health and safety search).

For standards for determining whether the search was improper in the first place, see §IV.B., "Search and Seizure," in the Center's 1982 manual *School Discipline and Student Rights*.

(d.) Exclusion of Privileged Communications

See §IV.G., "Privileged Communications," in the Center's 1982 manual *School Discipline and Student Rights*.

9. Recording the Hearing

The right of appeal or judicial review may be meaningless if the appellate body or court has no accurate record from which it can review the proceedings. There are a variety of approaches:

1. Does the school record the proceedings, or is the student given the right to do so?
2. Is the school's recording made automatically, or only upon the student's request?
3. Does the school make a written transcript or maintain a record in some form, such as a tape recording or summary of the proceedings?
4. If there is no written transcript, will the school provide a written summary of testimony from the tape, if one is made?
5. Is a copy of the tape or transcript provided to the student without charge, or for payment of a fee, or is the original simply made available to the student for inspection (with, perhaps, the right to make his/her own copy from it at his/her expense)?

(a.) Student's Right to Make a Recording

Several courts have recognized the importance of a verbatim record and have acknowledged the student's right to make a recording of the hearing.

See:

- Esteban v. Central Missouri State College, 277 F. Supp. 649, 652 (W.D. Mo. 1967), *approved*, 415 F.2d 1077 (8th Cir. 1969), *cert. denied*, 398 U.S. 965 (1970) (exclusion for two semesters);
- PUSH v. Carey, C.A. Nos. 73-C-2522, 74-C-303 (N.D. Ill., Nov. 5, 1975) (Mem. Opin. and Order, p. 9) (Clearinghouse No. 17,507) (suspensions potentially beyond 10 days; "the student, at his expense, should be able to make a tape recording or transcript of the hearing"), *rev'd in part on other grounds sub nom. Piphus v. Carey*, 545 F.2d 30 (7th Cir. 1976) (reversed because of lower court's failure to award damages to students), *rev'd on other grounds*, 435 U.S. 247, 98 S.Ct. 1042 (1978) (reversed on damages issue);
- Quintanilla v. Carey, C.A. No. 75-C-829 (N.D. Ill., Mar. 31, 1975) (Mem. Opin. and Order, p. 6) (Clearinghouse No. 15,369A) (permanent expulsion; "A tape recording of the hearing may be made.");
- Givens v. Poe, 346 F. Supp. 202, 209 (W.D.N.C. 1972) (suspension "for any substantial period of time");

- Marzette v. McPhee, 294 F. Supp. 562, 567 (W.D. Wis. 1968) (suspension or expulsion).

But see:

- Gorman v. University of Rhode Island, 837 F.2d 7, 15-16 (1st Cir. 1988) (lengthy suspension; written summary of evidence, testimony and decision made and maintained by university constituted a sufficient record; denial of student's request to videotape the proceedings did not violate due process).

(b.) School's Obligation to Make Record

Some courts have imposed upon the school the obligation to record the proceedings. At times, when a student does not prevail, a proceeding is *de novo*, or there is a substitute for a transcript, or recording.

See:

- Mills v. Board of Education, 348 F. Supp. 866, 882 (D.D.C. 1972) (suspension, transfer, or other exclusion from student's normal program for more than two days; "A tape recording or other record of the hearing shall be made and transcribed and, upon request, made available to the parent or guardian or his representative");
- Anderson v. Seckels, C.A. No. 75-65-2 (S.D. Iowa, Dec. 20, 1976) (Magistrate's Memorandum and Opinion, p. 15) (Clearinghouse No. 21,627C) (six-month suspensions; "transcript or recording of the proceedings");
- Behagen v. Intercollegiate Conference of Faculty Representatives, 346 F. Supp. 602, 608 (D. Minn. 1972) (suspension from basketball practices for remainder of season; "proceedings should be recorded, and the tapes should be made available to plaintiffs in the event they wish to appeal");
- Speake v. Grantham, 317 F. Supp. 1253, 1258 (S.D. Miss. 1970) (suspensions; "Proceedings at the hearing shall be transcribed at the expense of the University and a copy shall be furnished the Court and opposing counsel");
- Marin v. University of Puerto Rico, 377 F. Supp. 613 (D.P.R. 1974) (suspension for over a year; "the proceedings of which are transcribed");
- North v. West Virginia Board of Regents, 223 S.E.2d 411, 417 (W. Va. 1977) (expulsion; right to "an adequate record of the proceedings").

See also:

- Fielder v. Board of Education, 346 F. Supp. 722, 724 n.1 (text of preliminary injunction), 731 n.7 (D. Neb. 1972) (expulsion for remainder of year; "Such verbatim record of the hearing as such student

may elect to have at his own expense or the school board may elect to have at its own expense");

- Norristown Area School District v. A.V., 495 A. 2d 990, 993 (Pa. Comw. 1985) (expulsion; "...[school district] did not record the hearing, made no findings of fact and issued a delayed adjudication without findings and without setting forth reasons for the expulsion"; under statute, "where the record on appeal from an administrative decision is incomplete, the remedy is a *de novo* hearing or a remand").

Cf.:

- Jordan v. School District of City of Erie, 583 F.2d 91, 99 (3rd Cir. 1978) (consent decree) (disciplinary transfers for from six weeks to one year; "A stenographic, transcribed or taped record of both Hearing I and Hearing II shall be made and shall be available to the parent or guardian and student or his/her representative. Said record must be retained intact by the School District for a period of not less than three (3) years");
- Doe v. Kenny, C.A. No. H-76-199 (D. Conn., Oct. 12, 1976) (Clearinghouse No. 19,358C) (Consent Decree, p. 4) (disciplinary transfers; "Oral proceedings or any part thereon shall be transcribed on request of any party. The requesting party shall pay accordingly, the cost of such transcript or part thereof.");
- Bobbi Jean M. v. Wyoming Valley West School District, C.A. No. 79-576 (M.D. Pa., Nov. 3, 1980) (Clearinghouse No. 30,528B) (Consent Decree, "Sample Notice," p. 2) (exclusion beyond ten days; school required to keep record, parent entitled to copy of the transcript at own expense).

But see:

- Due v. Florida A. & M. University, 233 F. Supp. 396, 403 (N.D. Fla. 1963) (indefinite suspension);
- Sohmer v. Kinnard, 535 F. Supp. 50, 54 (D. Md. 1982) (dismissal from pharmacy school; no full transcript or recording of the hearing is required by due process; "The Committee did forward to the ultimate decision-maker a written report of its findings and recommendations...");
- Jaksa v. Regents of University of Michigan, 597 F. Supp. 1245, 1252 (E.D. Mich. 1984) (one term suspension; due process does not require verbatim transcript of hearings; handwritten notes of member of judiciary committee establishes record which, although not ideal, is constitutionally sufficient); *aff'd*, 787 F.2d 590 (6th Cir. 1986);
- Mary M. v. Clark, 473 N.Y.S. 2d 843 (N.Y. App. 1984) (suspension from university for cheating; no statutory or constitutional requirement for preparation of "a written record").

Compare:

- Navato v. Sletten, 560 F.2d 340 (8th Cir. 1977) (denial of certificate of completion of residency program; tape recording was sufficient, stenographic record not required);
- Morale v. Grigel, 422 F. Supp. 988 (D.N.H. 1976) (one-term suspension; failure to make a record of the initial hearing not a violation of due process here, since the appeal hearing was *de novo*).

The following decisions held that New York Education Law § 3214 (a "record.... but no stenographic transcript shall be required") requires a complete "verbatim record", not just a summary or incomplete record: Ross v. Disare, 500 F. Supp. 928, 933 (S.D.N.Y. 1977) (suspension beyond 5 days); Matter of Corbett, 12 Educ. Dept. Rep. 184 (N.Y. Educ. Comm'r 1973); Matter of Grandal, 11 Educ. Dept. Rep. 144 (N.Y. Educ. Comm'r 1972); Matter of Rose, 10 Educ. Dept. Rep. 4 (N.Y. Educ. Comm'r 1970).

G. FINDINGS AND REASONS

1. Separate Determinations of Misconduct and Sanction

The issues of whether the student engaged in misconduct and, if so, the appropriate sanction should be addressed separately.

Although the procedures in the simple suspension are relatively informal it cannot be emphasized too strongly that the entire thrust of the requirement is to insure that there is a genuine fact-finding process which is a 'meaningful hedge' against erroneous action.

...

[T]here must now be a fact-finding determination which precedes a determination about what to do about the child. Commonly these concerns get mixed up and the determination of whether the student was guilty of the act charged gets lost in the process. A determination of guilt for a specified offense is, under Goss v. Lopez, 419 U.S. 565, 95 S.Ct. 729 (1975)], a prerequisite for a suspension. This prerequisite must be met before school officials can properly determine if a suspension or some other alternative is in the 'best interests' of the child.

Peter Roos, "Goss and Wood: Due Process and Student Discipline," 20 *Inequality in Education* 42, 43-44 (1975).

In Mills v. Board of Education, 348 F. Supp. 866, 883 (D.D.C. 1972) (suspension, transfer, or other exclusion from student's normal program for more than two days), the court stated:

No finding that disciplinary action is warranted shall be made unless the Hearing Officer first finds, by clear and convincing evidence, that the child committed a prohibited act upon which the proposed disciplinary action is based. After this finding has been made, the Hearing Officer shall take such disciplinary action as he shall deem appropriate. This action shall not be more severe than that recommended by the school official initiating the suspension proceedings.

An argument can be made that the hearing tribunal should first hold a hearing on the issue of misconduct and then, if it finds misconduct, reconvene in the presence of the student and other relevant parties to consider the issue of a penalty. At that time, the student could make mitigating arguments and the student's past record, good and bad, could be entered into evidence and considered by the

tribunal. The determination of what actually happened in the case would not be tainted by generally irrelevant and possibly inflammatory information about other incidents, and that information would still serve a helpful role in determining an appropriate disciplinary action. Unless the hearing process is separated in this manner, it is difficult to see how the student can be assured of his/her rights to:

- (a) a hearing confined to the scope of the charges; see Chapter III.F.9.(b.), and
- (b) findings confined to the initial charges (see below).

Several New York decisions have held that the student's anecdotal record cannot be introduced into evidence until after there has been a determination of guilt. See, e.g., Matter of Grandal, 11 Educ. Dept. Rep. 144, 146 (N.Y. Educ. Comm'r 1972); Matter of Anderson, 11 Educ. Dept. Rep. 45, 47 (N.Y. Educ. Comm'r 1972); Matter of Watson, 10 Educ. Dept. Rep. 90 (N.Y. Educ. Comm'r 1971).

Cf.: Friedland v. Ambach, 522 N.Y.S.2d 696 (N.Y. App. Div. 1987) (teacher dismissal; questions concerning prior discipline did not adversely affect teacher's rights because the hearing panel was instructed that prior discipline could only be considered in assessing penalty and the questions were objected to and not answered).

Advocates might draw, generally, on Rule 403, Federal Rules of Evidence. This standard allows exclusion of evidence, "[a]lthough relevant," "if its probative value is substantially outweighed by the danger of unfair prejudice...." The Advisory Committee note states that "consideration should be given to the probable effectiveness of a limiting instruction" and "[t]he availability of other means of proof...."

For more on the requirement that there must be some proof of guilt, see Chapter III.F.7., "Burden of Proof, Presumption of Innocence." Cf. St. Ann v. Palisi, 495 F.2d 423 (5th Cir. 1974) (children may be disciplined only for their own acts and may not be punished for the acts of their parent).

Case law establishing the right of a student to a hearing on the appropriate penalty, even when misconduct is undisputed, supports the contention that findings and reasons should address sanction. See, for example, Strickland v. Inlow, 519 F.2d 744, 746 (8th Cir. 1975) (quoting Goss v. Lopez) and Chapter I.C.3.

The fact that a student has an opportunity to be heard does not, of course, guarantee an appropriate outcome. See Forrest v. School City of Hobart, 498 N.E.2d 14, 17-18 (Ind. Ct. App. 1986) (expulsion for remainder of school year for drug code violation; school is not required to consider factors such as student's prior disciplinary record, academic standing, good character, or contributions to school and community, when determining sanction).

The principles above may not apply where the rule under which the student is charged provides for a mandatory, automatic punishment once guilt is determined (assuming that such a rule is itself legal). In such a case, the hearing

tribunal has no discretion in its decision regarding the appropriate penalty, and therefore, arguably, the student need not be given the opportunity to be heard on the issue. The student may, however, raise a legal claim that the automatic punishment rule operates to impose a penalty so disproportionate to the offense that it violates equal protection, substantive due process, or other law. See Paine v. Board of Regents, 355 F. Supp. 199 (W.D. Tex. 1972), where the court struck down an automatic expulsion rule as imposing an unreasonable penalty. Cf. Mitchell v. Board of Trustees, 625 F.2d 660, 663-64 and n.8 (5th Cir. 1980).

See also §VI., "Unreasonable, Excessive or Unauthorized Rules or Punishment," and §VIII.A., "Exclusion" (Substantive Challenges), in the Center's 1982 manual *School Discipline and Student Rights*.

2. Standard of Proof (Clear and Convincing Evidence?)

The standard of proof used by the *trial factfinder* in making findings may well determine the outcome of the proceeding. This issue was addressed in detail in Smyth v. Lubbers, 398 F. Supp. 777, 797-99 (W.D. Mich. 1975).

It is in light of the high stakes involved [two-year suspension for possession of drugs] that the Court must determine whether a standard of proof is required by the Due Process Clause, and if so, whether the 'substantial evidence' standard is constitutionally adequate. The court concludes that at least where an adult student is charged by a College with committing an act which is a crime, the Due Process Clause requires that some articulated and coherent standard of proof be formally adopted and applied at the college hearing which determines the student's guilt or innocence of the charge. If such a standard is not adopted and applied, then the college hearing board is totally free to exercise its prejudices or to convict for the purpose of vindicating 'order and discipline' rather than on the evidence presented. All the rest of the procedural guarantees become or threaten to become meaningless as even a well-intentioned hearing board is adrift in uncertainty over the measure of persuasion to be applied. That there be an articulated and coherent standard of proof is all the more crucial to fundamental fairness where, as in the college context, there are few constitutional or practical limitations on the nature of evidence which may be admitted against the accused.

...

The first problem with the 'substantial evidence' standard is that it is, standing alone, primarily a formula intended for appellate review of trial courts' determinations or judicial review of administrative determinations. Trial courts and administrative agencies have functions different from appellate and reviewing courts. Trial courts and administrative agencies have the original task of resolving conflicts in the evidence and between opposing interpretations. An appellate or reviewing court, in contrast, has the task of determining only whether the trial court or administrative body had a rational basis for its decision. The appellate or reviewing court does not conduct a trial de novo and resolve conflicting views a second time. A standard appropriate for a reviewing court to apply to determine whether there is a minimal rational basis for decision is not appropriate for an

original trier of fact to resolve conflicts in the evidence and between opposing interpretations. The issue before the trier of fact is not whether there is a minimal basis for conviction or whether a conviction would survive appeal or collateral attack. See Jaffe, 'Administrative Law: Burden of Proof and Scope of Review,' 79 Harv. L. Rev. 914, 915 (1966).

The substantial evidence formula standing alone as a standard of proof for the trial court provides no measure of persuasion or degree of proof to guide the court in resolving conflicts to reach its ultimate decisions, but goes only to the quantity of evidence required by the prosecutor. Under the College's rule, the College need only present a certain quantum of evidence (substantial) that a party was guilty as charged, and the All College Judiciary could convict, regardless of what else appeared in evidence.... It may be that in other contexts a 'substantial evidence' rule implies a 'preponderance of the evidence' standard of proof which is understood and applied by trained hearing officers and expert administrative agencies, but the court cannot assume that this lay Judiciary knew or understood or applied the principle....

'Substantial evidence' has been defined as enough evidence 'to justify, if the trial were to a jury, a refusal to direct a verdict.' Assuming this definition embodies an intelligible standard of proof for a trier of fact, that standard is too low. The application of any standard lower than a 'preponderance of evidence' would have the effect of requiring the accused to prove his innocence. Under the circumstances of this case, at least, it would be fundamentally unfair to shift the burden of proof to the accused.

The Court concludes that the College's 'Due Process' Rule 14 in the 1973-74 Student Handbook which states, 'No disciplinary action shall be taken on grounds which are not supported by substantial evidence' is constitutionally inadequate as a standard of proof because it provides no intelligible standard of proof to guide the All College Judiciary, or because, to the extent that it might embody an intelligible standard, that standard is totally one-sided and is lower than that constitutionally required.

...

The court need not and does not reach the question of precisely what standard of proof would be constitutionally adequate under the circumstances of this case. The court is certain that the standard cannot be lower than 'preponderance of the evidence.' However, given the nature of the charges and the serious consequences of conviction, the court believes the higher standard of 'clear and convincing evidence' may be required.¹⁵ The 'clear and convincing' standard is well below the criminal standard which the College hearing officer thought would be the 'fairest' to apply in these cases ['proof beyond a reasonable doubt']. The 'clear and convincing' standard would be consistent with the general proposition that 'school regulations are not to be measured by the standards which prevail ... for criminal procedure' and would not be so strict a requirement as to cripple the disciplinary process. The court recommends that the College give serious consideration to adopting the 'clear and convincing' standard for future cases.

15. In Woodby, *supra*, the Supreme Court held that no deportation order may be entered unless it is found by clear, unequivocal and convincing evidence that the facts alleged as ground for the deportation are true. In the case of In re Winship, 397 U.S. 358...

(1970), the Supreme Court held that proof beyond a reasonable doubt is among the essentials of due process and fair treatment required during the adjudicatory stage of a juvenile delinquency proceeding when a juvenile is charged with an act which would constitute a crime if committed by an adult. Although the juvenile's physical liberty was at stake, the Court emphasized also the element of stigma which attaches upon conviction. *Id.* at 363-364....

In a footnote, the court observed that the many cases previous to Smyth which refer to "substantial evidence" as a requirement of due process were "stating the rule on appeal None was stating an original standard of proof...". *Id.*, at 798 n.13. However, two other decisions appear to establish a "substantial evidence" standard for the "original" determination. See Givens v. Poe, 346 F. Supp. 202, 209 (W.D. N.C. 1972) (suspension "for any considerable period of time"); Vall v. Board of Education, 354 F. Supp. 592, 603-04 (D.N.H.), *remanded for further relief*, 502 F. 2d 1159 (1st Cir. 1973) (suspension beyond five days).

The "clear and convincing evidence" standard was required by Mills, *supra*, 348 F. Supp. 866 (D.D.C. 1972). Cf. Gonzales v. McEuen, 435 F. Supp. 460, 466 (C.D. Cal. 1977) (expulsion for remainder of year), where the court, after finding that the school board's hearing had been procedurally inadequate, stated that it, the court, would use the "standard of 'clear and convincing' proof" to weigh the evidence itself, rather than limiting the scope of judicial review to "substantial evidence" as in the "ordinary case."

See also:

- Thompson v. City of Louisville, 362 U.S. 199, 80 S.Ct. 624 (1960) (convictions based on "no [supportive] evidence whatever in the record" deny due process of law);
- Jackson v. Hayakawa, 761 F.2d 525, 527 (9th Cir. 1985) (reprimands, probations and expulsions; "No disciplinary action could be taken on grounds which were not supported by substantial evidence. Defendants presented no evidence to show that the students individually committed disorderly acts.").

The "substantial evidence" standard, generally appropriate for review on appeal, is discussed in Chapter III.H.3.

For purposes of insuring that the hearing panel bases its findings upon clear and convincing evidence, it may be helpful to insist that this basis be included in the written findings. See comments to Chapter III.G.4., "Issuance of Findings and Reasons."

3. Burden of Proof

A few courts have addressed the question of which party has the burden of proof on the appropriate disciplinary action or other disposition (as distinct from the burden of proof on guilt or innocence).

See:

- Mills v. Board of Education, 348 F. Supp. 866, 882 (D.D.C. 1972) (suspension, transfer, or other exclusion from student's normal program for more than two days; "Defendants shall bear the burden of proof as to all facts and as to the appropriateness of any disposition and of the alternative educational opportunity to be provided during any suspension");
- Hairston v. Drosick, 423 F. Supp. 180, 184 (S.D. W. Va. 1976) (due process required for placement in special classes would be fulfilled by implementing regulations which provide, in part, "that the burden of proof as to the appropriateness of any proposed placement be upon the school personnel recommending the placement");
- Chicago Board of Education v. Terrile, 47 Ill. App. 3d 75, 361 N.E.2d 788 (Ill. App. Ct. 1977) (improper to commit student to a parental school for truancy unless board made affirmative showing that less restrictive alternatives were not suitable to meet her needs and that the parental school was suitable to meet those needs).

4. Issuance of Findings and Reasons

Courts have generally held that students are entitled to written findings of fact, at least for long-term discipline, and have sometimes required additional details, such as reasons, reference to evidence, and the like.

See:

- Jordan v. School District of City of Erie, 583 F.2d 91, 98, 99 (3d Cir. 1978) (consent decree) (disciplinary transfer for from six weeks to one year; "a decision in writing which shall be accompanied by written findings of fact");
- French v. Bashful, 303 F. Supp. 1333, 1338-39 (E.D. La. 1969), *modified and aff'd*, 425 F.2d 182 (5th Cir. 1970) (indefinite suspensions and expulsions; "findings");
- Esteban v. Central Missouri State College, 277 F. Supp. 649, 652 (W.D. Mo. 1967), *approved*, 415 F.2d 1077, 1081 (8th Cir. 1969), *cert. denied*, 398 U.S. 965 (1970) (exclusion for two semesters; "finding as to whether or not the student charged is guilty of the conduct charged and the disposition to be made, if any, by way of disciplinary action");

- Doe v. Kenny, C.A. No. H-79-199 (D. Conn., Oct. 12, 1976) (Consent Decree, p. 4) (Clearinghouse No. 19,358C) (disciplinary transfers; "reasons on which the decision is based");
- DeJesus v. Penberthy, 344 F. Supp. 70, 76 (D. Conn. 1972) (expulsion; "absence of findings;" "action must rest on a specified basis 'set forth with such clarity as to be understandable'");
- Mills v. Board of Education, 348 F. Supp. 866, 883 (D.D.C. 1972) (suspension, transfer, or other exclusion from student's normal program for more than two days; "findings");
- Anderson v. Seckels, C.A. No. 75-65-2 (S.D. Iowa, Dec. 20, 1976) (Mem. and Opin., p. 15) (Clearinghouse No. 21,627C) (six-month suspensions; "The Board's findings of fact and determination were not adequately set out.");
- Mello v. School Committee of New Bedford, C.A. No. 72-1146F (D. Mass., Apr. 6, 1972) (Temp. Injunc., p. 2) (Clearinghouse No. 7,773) ("substantially stating the evidence on which it is based");
- Behagen v. Intercollegiate Conference of Faculty Representatives, 346 F. Supp. 602, 608 (D. Minn. 1972) (suspension from basketball practice for remainder of season; "findings of fact, and if there is to be any punishment the basis for such punishment");
- Speake v. Grantham, 317 F. Supp. 1253, 1258 (S.D. Miss. 1970) (suspensions for one year; "decide this matter in writing and in sufficient detail to disclose the basis of its findings and action taken pursuant thereto");
- Graham v. Knutzen, 351 F. Supp. 642, 668 (D. Neb. 1972) (all suspensions; "an answer from the school: (1) defining his expulsion; (2) the reasons therefor; and (3) such procedures, if any, to be complied with before reinstatement is allowed");
- Fielder v. Board of Education, 346 F. Supp. 722, 724 (D. Neb. 1972) (expulsion for remainder of year; "the facts forming the basis of the finding of guilt and the disciplinary action taken");
- Morale v. Grigel, 422 F. Supp. 988, 1004 (D.N.H. 1976) (lengthy suspension; given severity of punishment and lack of burden on school, "written reasons are constitutionally mandated"; no error here);
- Corr v. Mattheis, 407 F. Supp. 847, 853 (D.R.I. 1976) (termination of student's federal financial aid; "the reasons for his determination and indicate the evidence he relied on;" while "a full opinion or even formal findings of fact and conclusions of law" are not required, it is not enough to simply recite the words of the rule found to have been violated);
- Gratton v. Winooski School District, C.A. No. 74-86 (D. Vt., Apr. 10, 1974) (Prelim. Injunc., p. 6) (Clearinghouse No. 45,539) (indefinite suspension; "the reasons for the determination and the evidence relied upon in support thereof");

Chapter III

- Marzette v. McPhee, 294 F. Supp. 562, 567 (W.D. Wis. 1968) (suspension or expulsion; "results and findings");
- Jones v. Pascagoula Municipal Separate School District, 524 So. 2d 968, 973 (Miss. 1988) (expulsion for a semester; "Especially where there are multiple allegations, findings of fact should be made.")

See also:

- Wolff v. McDonald, 418 U.S. 539, 564, 94 S.Ct. 2963, 2979 (1974) (prison inmates in disciplinary hearings entitled to "written statement by the factfinders as to the evidence relied on and reasons for the disciplinary action," quoting Morrissey v. Brewer, 408 U.S. 471, 489, 92 S.Ct. 2593, 2604 (1972));
- Goldberg v. Kelly, 397 U.S. 254, 271, 90 S.Ct. 1011, 1022 (1969) (termination of welfare benefits; "the reasons for...determination and...the evidence...relied on...though [the] statement need not amount to a full opinion or even formal findings of fact or conclusions of law").

Cf.:

- McGhee v. Draper, 564 F.2d 902, 912 (10th Cir. 1977) (teacher discharge; "due process also required a statement of reasons for the discharge and an indication of the proof relied on ... to assure that ex parte proofs are not relied on and a reasoned decision is made");
- Staton v. Mayes, 552 F.2d 908, 915-16 (10th Cir. 1977) (discharge of superintendent; conclusory terms not sufficient; "reasons for the determination and the evidentiary basis relied on" required as "a safeguard against a decision on ex parte evidence");
- Hairston v. Drosick, 423 F. Supp. 180, 185 (S.D. W. Va. 1976) (requisite due process for placement in special classes would be fulfilled by implementing regulations which provide, in part, "that the decision include findings of fact, conclusions and reasons for these findings and conclusions");
- Norristown Area School District v. A.V., 495 A.2d 990, 993 (Pa. Cmwlth. 1985) (expulsion; statute violated where school board failed to make "findings of fact" or "[set] forth reasons for the expulsion");
- Big Spring School District v. Hoffman, 489 A.2d 998, 1001 (Pa. Cmwlth. 1985) (expulsion for 30 days and exclusion from extracurricular activities for two years; "[B]oard's decision is completely devoid of any findings or reasons for its decision to expel..." in violation of statute).

But see:

- Jaksa v. Regents of University of Michigan, 597 F. Supp. 1245, 1253-54 (E.D. Mich. 1984) (one term suspension for cheating; student had no constitutional right to receive a detailed statement of reasons for suspension, since notice of the charges was given and the reasons for the decision were "obvious"), *aff'd*, 787 F.2d 590 (6th Cir. 1986);

- Linwood v. Board of Education, 463 F.2d 763, 770 (7th Cir. 1972), *cert. denied*, 409 U.S. 1027 (1972) (expulsion for the remainder of semester; written findings of fact not required);
- Davis v. Mann, 721 F. Supp. 796, 800 & n.5 (S.D. Miss. 1988) (*academic dismissal from dental school residency program; no requirement of "specific findings of guilt" re each charge; moreover, student "admitted most of the actions..."; "...the requirement that reasons be stated would seem also to be inapplicable to the instant situation..."*).

Specific, detailed findings serve a number of related purposes. They encourage the hearing tribunal to make sure that the evidence is clear and convincing before finding against the student. See Chapter III.G.2. They also provide a means of encouraging a decision based solely on the evidence presented at the hearing. See Fielder, *supra*, 346 F. Supp. 722, 731 n.7 (D. Neb. 1972):

School boards, as well as other units of government, should be models of fairness.... Limiting the making of the decision by the board to the presentations at the hearing safeguards against the possible reliance by the board on unverified assertions and rumors against which no one can be expected in fairness to defend; and a written declaration by the board that it has made its decision solely from the presentations will tend to make it so.

Cf.:

- McGhee v. Draper, *supra*, 564 F. 2d at 912;
- Staton v. Mayes, *supra*, 552 F. 2d at 916.

See Chapter III.G.5. Finally, as the court indicated in DeJesus, *supra*, 344 F. Supp. 70 (D. Conn. 1972), one of the reasons for requiring detailed written findings is to provide an adequate basis for review. See Securities and Exchange Commission v. Chenery Corp., 318 U.S. 80, 94-95, 63 S.Ct. 454, 462 (1943). See also Chapter III.H., "Appeal and Judicial Review."

5. Other Issues Concerning Findings

(a.) Findings Based Solely Upon the Evidence Presented at the Hearing

The reasons for requiring that a disciplinary decision be based solely upon evidence presented at the hearing are stated in Matter of DeVore, 11 Educ. Dept. Rep. 296 (N.Y. Educ. Comm'r 1972) (indefinite suspension based upon arrest for alleged drug possession):

The superintendent chose ... to rely upon his personal knowledge of the fact of arrest and the basis for the arrest. It is evident from a reading of the transcript that he utilized such personal knowledge as an alternative to testimony. There are, of course, three essential defects in this procedure.

First, a decision to impose a disciplinary penalty and the extent of the penalty must be supported by the evidence contained in the record. This cannot be the case where the fact of arrest is established solely from the private knowledge of the hearing officer. Secondly, it is impossible for the student to cross-examine or in any way rebut the private, nontestimonial knowledge of the hearing officer. Third, and perhaps most serious, is the fact that the hearing officer loses his neutral posture and, in effect, becomes a salient witness in support of the charges. Nothing is more essential than a neutral hearing officer.

The requirement that findings be based solely upon evidence presented at the hearing has been articulated by several other courts.

See, e.g.:

- Esteban v. Central Missouri State College, 277 F. Supp. 649, 652 (W.D. Mo. 1967), *approved*, 415 F.2d 1077 (8th Cir. 1969), *cert. denied*, 398 U.S. 965 (1970) (exclusion for two semesters);
- DeJesus v. Penberthy, 344 F. Supp. 70 (D. Conn. 1972) (expulsion);
- Mills, *supra*, 348 F. Supp. 866, 882 (D.D.C. 1972);
- Fielder v. Board of Education, 346 F. Supp. 722, 731 n.7 (D. Neb. 1972) (expulsion for remainder of year);
- Mello v. School Committee of New Bedford, C.A. No. 72-1146F (D. Mass., Apr. 6, 1972) (Temp. Injunc., p. 2) (Clearinghouse No. 7,773) (all exclusions);
- Marzette v. McPhee, 294 F. Supp. 562 (W.D. Wis. 1968) (suspension or expulsion).

See also:

- Goldberg v. Kelly, 397 U.S. 254, 271, 90 S.Ct. 1011, 1022 (1970) (required in welfare hearings).

Cf.:

- Hairston v. Drosick, 423 F. Supp. 180, 184 (S.D. W. Va. 1976) (due process required for placement in special classes would be fulfilled by implementing regulations which include this requirement).

Compare:

- Newsome v. Batavia Local School District, 842 F. 2d 920, 927-28 (6th Cir. 1988) (short expulsion; due process violation occurred where superintendent provided evidence to school board during its deliberations which was not offered at open hearing);
- Morrison v. University of Oregon Health Sciences Center, 685 P. 2d 439 (Or. App. 1984) (dismissal from dental school; consideration during deliberations of evidence outside record violated school rules and statute).

But cf.:

- Morale v. Grigel, 422 F. Supp. 988, 1004 (D.N.H. 1976) (one-term suspension; possible consideration of other information harmless error here, since there was independent evidence at hearing).

Here again, requiring that the written findings specify the evidence relied upon will help to insure that this requirement is met. Fielder, *supra*, 346 F. Supp. 722 (D. Neb. 1972).

(5.) Findings Tied to Guilt of Initial, Specific Charges

The reasons for requiring that there be a finding that the student is guilty of the initial charges are much the same as the reasons for requiring that the findings be based solely upon evidence presented at the hearing: any other basis for decision would destroy the student's opportunity to present a defense to the charges. Several courts have recognized this principle.

See, e.g.:

- Navato v. Sletten, 560 F.2d 340, 346 (8th Cir. 1977) (denial of certificate of completion of residency program);
- Strickland v. Inlow, 519 F.2d 744, 747 (8th Cir. 1975) (students' "opportunity to present their side of the case was rendered meaningless" by decision based upon a second charge, of which they were not notified);
- Gonzales v. McEuen, 435 F. Supp. 460, 469 (C.D. Cal. 1977) (expulsion for remainder of year; language similar to Strickland, but student found to have waived this objection);
- Matter of Lawlor, 11 Educ. Dept. Rep. 261, 263 (N.Y. Educ. Comm'r 1972) (student suspension cannot be based upon acts not specified in the notice).

Cf.:

- Powell v. Board of Trustees, 550 P.2d 1112 (Wyo. 1976) (teacher dismissal overturned because guilt was based upon charge not originally specified).

For further discussion, see comments and cases concerning notice of charges in Chapter III.B., "Notice." The requirement that the student's conduct be found to violate a specific, publicized standard of conduct is discussed in §V., "Right to Notice of Rules and Punishments" in the Center's 1982 manual *School Discipline and Student Rights*.

(c.) Penalty Limited to the Recommendation in the Initial Notice

"After this finding has been made, the Hearing Officer shall take such disciplinary action as he shall deem appropriate. This action shall not be more severe than that recommended by the school official initiating the suspension proceedings."

Mills, *supra*, 348 F. Supp. 866, 883 (D.D.C. 1972).

(d.) Deadline for Mailing Findings

A few courts have addressed the need for a prompt decision.

See:

- Jordan, *supra*, 583 F.2d 91 (3d Cir. 1978) (within five days of hearing);
- Graham, *supra*, 351 F. Supp. 642, 668 (D. Neb. 1972) ("Failure to make timely such conclusions and the opportunity to be challenged by the child and his legal custodians is a failure of the due process");
- Mills, *supra*, 348 F. Supp. at 883 (D.D.C. 1972) (3 days);
- Mello, *supra*, C.A. No. 72-1146F (D. Mass., Apr. 6, 1972) (Prelim. Injunc., p. 2) (Clearinghouse No. 7,773) ("the right to a reasonably prompt decision").

Cf.:

- Hairston v. Drosick, *supra*, 423 F. Supp. 180, 185 (S.D. W. Va. 1976) (decision concerning placement in special classes issued within 30 days).

A prompt decision is particularly crucial when, because of emergency conditions, the student has been suspended pending the outcome of the hearing.

(e.) Procedure for Reinstatement

Some students never successfully return to school from suspensions. Thus, it is important that the written findings provide definite notice of when and how to return. See Children's Defense Fund, *Children Out of School in America* 118, 125 (1974); Children's Defense Fund, *School Suspensions: Are They Helping Children?* 50 (1975).

Indefinite exclusions are subject to challenge on a number of grounds, all of which are discussed in Substantive Rights, §VII.E.5.a., "You're Suspended Until Your Parent Comes In," in the Center's 1982 manual *School Discipline and Student Rights*.

(f.) Penalty Proportionate to the Offense

See §VI., "Unreasonable, Excessive or Unauthorized Rules or Punishments - General Legal Concepts;" as well as the discussion of particular forms of discipline in §VIII, "Challenging Specific Types of Punishment" [for example, §VIII.A., "Exclusion (Suspension, Expulsion, Etc.)"] in the Center's 1982 manual *School Discipline and Student Rights*.

H. APPEAL AND JUDICIAL REVIEW

1. Right of Internal Appeal

It is generally recognized that the due process clause does not necessarily require that a school provide for an administrative appeal. See, e.g., Brewer v. Austin Independent School District, 779 F.2d 260, 263, 264 (5th Cir. 1985). The main purpose of an appeal, however, is to insure that the initial hearing body arrived at a fair result through the appropriate due process procedures. Since legally a student can generally obtain judicial review in order to determine whether the hearing body violated his/her right to due process or deprived him/her of some other constitutional or statutory right, an internal appeals process can often correct any such unfairness without unnecessary litigation. (See §XIII.A.2. on judicial remedies, in the Center's 1982 manual *School Discipline and Student Rights*.)

Thus, the court in Zanders v. Louisiana State Board of Education, 281 F. Supp. 747, 761 (W.D. La. 1968), stated:

Moreover, we recommend that each disciplinary procedure incorporate some form of appeal.... The practicality of this suggestion lies in the fact that this would evidence one more sign of the particular institution taking initiative carefully to safeguard the basic rights of the student as well as its own position, prior to disciplining him for misconduct.

See also Nash v. Auburn University, 812 F. 2d 655, 666-67 (11th Cir. 1987) (one-year suspension from school of veterinary medicine for academic dishonesty; "The possibility that an erroneous decision may have been made by the board was diminished by the extensive review by the faculty committee.").

One court has stated that the right of appeal is basic to students' due process rights. In the context of a desegregation case in which the court ordered the development of a new discipline code, the court in Bradley v. Milliken, C.A. No. 35257 (E.D. Mich., July 3, 1975), found the Detroit Board of Education's proposed code inadequate, in part because:

The Board's proposed code of conduct should include a section which clearly spells out a student's due process rights, *viz*: ... the right to appeal.... Moreover, the code must provide for an appeal as of right to a panel selected by the Regional Superintendent. The appeal panel should include one member of the community not otherwise associated with the school system, and two members selected from teachers, counselors, and administrators.

Similarly, in Berry v. School District of the City of Benton Harbor, 515 F. Supp. 344, 380 (W.D. Mich. 1981), the court's desegregation remedy included the development of discipline procedures which "should include an opportunity for a prompt appeal by a student or parent to a bi-racial panel...."

In a different context, the court in Mills v. Board of Education, 348 F. Supp. 866, 883 (D.D.C. 1972), ordered an appeals process as part of the due process procedures appropriate to suspensions, transfers, and other exclusions from the student's normal program for more than two days. *Cf. Hairston v. Drosick*, 423 F. Supp. 180, 185 (S.D. W. Va. 1976) (due process required for placement in special classes would be fulfilled by implementing regulations which provide, in part, "that the parents be afforded a mechanism for administrative appeal").

Appeals procedures can be established by consent decree. *See, e.g., Jordan v. School District of City of Erie*, 583 F.2d 91, 98-99 (3d Cir. 1978) (disciplinary transfers of six weeks to one year). In addition, rights of appeal are often established by state statute or local regulation.

While the due process clause does not, generally, mandate appeal procedures, a school's failure to follow its own rule providing for an appeal might, depending upon the particular facts, give rise to a claim under several theories. First, a due process violation may occur if "an individual has reasonably relied on agency regulations promulgated for his (or her) guidance and has suffered substantially because of their violation by the agency." United States v. Caceres, 440 U.S. 741, 752-53, 99 S.Ct. 1464, 1472 (1972). Second, some courts require substantial compliance with adopted rules as a matter of administrative law. *E.g., C.J. v. School Board of Broward County*, 438 So. 2d 87 (Fla. App. 1983). Third, in cases involving the higher education level and private schools, generally, rule violations may violate contract rights or be vulnerable under the "law of associations." *See, e.g., Harvey v. Palmer College of Chiropractic*, 363 N.W. 2d 443 (Iowa App. 1984) (private college did not select hearing panel members in accord with its rules) and Tedeschi v. Wagner College, 404 N.E. 2d 1302, 1306, 427 N.Y.S. 2d 760, 765 (N.Y. 1980) (failure to provide "review" procedures specified by "guideline").

2. Review Proceedings versus De Novo Proceedings

Under some procedural schemes, the student's appeal will include a *de novo* hearing, in which everything starts over, the burden of proof is on the accusers, evidence and testimony are introduced, and a new decision is made without reference to the decision at the lower level. See, e.g., Jordan, *supra*, 583 F.2d at 91 (3d Cir. 1978) (extensive second-level hearing procedures).

Most judicial appeals, as well as many internal appeals, however, are review proceedings rather than *de novo* hearings. See, e.g., Nash v. Auburn University, 812 F. 2d at 666 (11th Cir. 1987); Mills, *supra*, 348 F. Supp. at 883 (D.D.C. 1972). Where the administrative or judicial appeal is not *de novo*, the record of the initial hearing is reviewed and oral argument about the record and the applicable law is allowed; new evidence, testimony of witnesses, and cross-examination are generally not permitted. Rather than starting with a presumption of innocence and conducting an independent review, such a review starts with a presumption that the lower body's findings of fact were correct. But see Sohmer v. Kinnard, 535 F. Supp. 50, 54 (D.Md. 1982) ["A student's right to be heard does not necessarily extend to an *appearance* before the ultimate authority in the disciplinary process." (emphasis added)].

In some cases, however, where review reveals that a new hearing is required, the appeals body will occasionally provide *de novo* proceedings itself rather than remand. See Gonzales v. McEuen, 435 F. Supp. 460, 466, 467-68 (C.D. Cal. 1977), where the court, after finding that the initial hearing was presumably tainted by bias, in effect examined the evidence *de novo*, conducting its own independent examination of the evidence under a "clear and convincing" standard.

See generally:

- Pittsburgh Board of Public Education v. M.J.N., 105 Pa. Commw. 397, 403-05, 524 A.2d 1385, 1387-88 (Pa. Commw. Ct. 1987) (expulsion; under statute, court was authorized to assume fact-finding function on issue where "the record was incomplete..."; court was not required to remand to board to establish a complete record);
- In re Appeal of McClellan, 82 Pa. Commw. 75, 475 A.2d 867 (Pa. Commw. Ct. 1984) (twenty-four day suspension; under statute, where record is complete, review is limited to violation of constitutional rights, error of law, adherence to state procedures, and whether the decision is supported by substantial evidence);
- Norristown Area School District v. A.V., 90 Pa. Commw. 508, 495 A.2d 990 (Pa. Commw. Ct. 1985) (expulsion; school board cannot hold second hearing, allegedly free from procedural defects, while issues raised in first hearing are on appeal to court).

3. Standards for Review Proceedings

(a.) "Substantial Evidence"

The proper standard for judicial review of school disciplinary hearings and for administrative review when not *de novo* ordinarily is whether the findings were based upon "substantial evidence." This should not be confused with the higher degree of proof which the hearing body itself must find; see discussion under Chapter III.G.2., "Determination of Misconduct," concerning "clear and convincing evidence."

In Universal Camera Corp. v. N.L.R.B., 340 U.S. 474, 477, 488, 71 S.Ct. 456, 459, 464 (1951), the Supreme Court stated that

'[s]ubstantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' ... Accordingly, it 'must do more than create a suspicion of the existence of the fact to be established. * * It must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury.'

* * *

The substantiality of evidence must take into account whatever in the record fairly detracts from its weight.

(Citations omitted.)

This last point was reiterated in a teacher dismissal case, Thompson v. Wake County Board of Education, 292 N.C. 406, 410, --- S.E.2d ---, --- (1977). There, the North Carolina Supreme Court stated that "substantial evidence in view of the whole record" requires the court to examine not only the evidence supporting the school board's decision, but also other evidence in the record which contradicts or detracts from that decision. However, the court may not substitute its own judgment for the board's if there are two views in reasonable conflict.

See:

- Black Students v. Williams, 335 F. Supp. 820, 823 [M.D. Fla., *aff'd*, 470 F. 2d 957 (5th Cir. 1972)] (ten day suspension);
- Jones v. State Board of Education, 279 F. Supp. 190, 200 (M.D. Tenn. 1968), *aff'd*, 407 F.2d 834, 836 (6th Cir. 1969), *cert. dismissed*, 397 U.S. 31 (1970) (indefinite suspension);
- Wong v. Hayakawa, 464 F.2d 1282, 1283 (9th Cir. 1972), *cert. denied*, 409 U.S. 1130 (1973) (disciplinary action);
- Nash v. Auburn University, 812 F. 2d 655, 668 (11th Cir. 1987) (suspensions for academic dishonesty; "[T]here was substantial evidence to

support the board's conclusion that appellants were guilty of academic dishonesty...");

- Sohmer v. Kinnard, 535 F. Supp. 50, 54 (D. Md. 1982) (dismissal from school of pharmacy; "[T]he Committee had substantial evidence to support its recommendation.");
- Speake v. Grantham, 317 F. Supp. 1253, 1281-82 (S.D. Miss. 1970) (one year suspension);
- Sill v. Pennsylvania State University, 318 F. Supp. 608, 621 (M.D. Pa. 1970) (exclusions of varying lengths);
- Sullivan v. Houston Independent School District, 307 F. Supp. 1328, 1346 (S.D. Tex. 1969) (suspension "for substantial period of time").

See also (statutory or other state law grounds):

- McEntire v. Brevard County School Board, 471 So. 2d 1287, 1288 (Fla. Dist. Ct. App. 1985) (expulsion; "[T]here...was no competent, substantial evidence to support the Board finding that McEntire violated [the] Rule...by selling pills which he represented to be speed on the campus. There was no evidence..."; statutory standard);
- Labrosse v. St. Bernard Parish School Board, 483 So. 2d 1253, 1256 (La. Ct. App. 1986) (expulsion reversed by district court; focus for "reviewing court...is whether the administrative body had a rational basis for its discretionary determinations and whether these determinations were supported by substantial evidence insofar as factually required..." (emphasis in original; statutory standard);
- Birdsey v. Grand Blanc Community Schools, 344 N.W. 2d 342, 345 (Mich. App. 1983) (expulsion; court bound by school board findings "if there is competent, material and substantial evidence to support them"; based upon state constitution);
- Fain v. Brooklyn College, 493 N.Y.S. 2d 13 (N.Y. App. 1985) (students found guilty of misconduct; "...determinations were not supported by substantial evidence"; the conclusion reached "could [not] be exacted reasonably, probatively, and logically" from the proof presented by "a fair and detached factfinder"; statutory ground);
- Sabin v. State University of New York Maritime College, 92 A.D.2d 831, 832, 460 N.Y.S.2d 332, 333 (N.Y. App. Div. 1983) (cadet disenrolled as not "appropriately suited to the military discipline"; statutory ground);
- Big Spring School District v. Hoffman, 88 Pa. Commw. 462, 467, 489 A.2d 998, 1000 (Pa. Commw. Ct. 1985) (ten day suspension, thirty day expulsion, exclusion from extracurricular activities; statutory standard);
- Appeal of McClellan, *supra*, 475 A.2d at 869, 871 (Pa. Commw. Ct. 1984) (twenty-four day suspension; statutory standard).

But see:

- McDonald v. Board of Trustees, 375 F. Supp. 95, (N.D. Ill. 1974) (expulsion; uses standard of some supporting evidence);
- Gorman v. University of Rhode Island, 646 F. Supp. 799, 813-14 (D.R.I. 1986) (long term suspension, exclusion from extracurricular activities; plaintiff correctly contends that substantial evidence standard applies to college's decision; reviewing court considers whether "some evidence" supports the [school's] decision..."); *aff'd* as to other issues, 837 F. 2d 7 (1st Cir. 1988).

In Wood v. Strickland, 420 U.S. 308, 95 S.Ct. 992 (1975), the Supreme Court addressed a situation in which the Court of Appeals for the Eighth Circuit had ruled that an expulsion rested on "no evidence that [a] school regulation had been violated..." *Id.*, 420 U.S. at 322-23, 95 S.Ct. at 1001. The Supreme Court held that when the court of appeals' erroneous construction of the school regulation was corrected, "there was no absence of evidence before the school board to prove the charge against [the students]." *Id.*, 420 U.S. at 324-25, 95 S.Ct. at 1002. It then described evidence plainly satisfying the "substantial evidence" standard. *Id.*, 420 U.S. at 325-26, 95 S.Ct. at 1002-03. The Court, continued, stating in part (*id.*, 420 U.S. at 326, 95 S.Ct. at 1003):

Given the fact that there was evidence supporting the charge against respondents, the contrary judgment of the Court of Appeals is improvident.... But [42 U.S.C.] §1983 does not extend the right to relitigate in federal court evidentiary questions arising in school disciplinary proceedings or the proper construction of school regulations.

In context, the use of the word "relitigate" seemingly disapproved only a factual review extending beyond a search for substantial evidence. See Diggles v. Corsicana Independent School District, 529 F. Supp. 169, 173 (N.D. Tex. 1981) (interpreting Wood in this manner). However, some courts have construed Wood to place sharp limits on review of factual questions. See Pollnow v. Glennon, 757 F.2d 496, 501 n.7 (1985) (lengthy suspension; "the presence or absence of a sufficient evidentiary basis for Glennon's decision to suspend Otto is not a matter for federal court determination:..."); Smith v. Little Rock School District, 582 F. Supp. 159, 162 (E.D. Ark. 1984) (expulsion for remainder of semester; court will not render contrary judgment "if there is evidence to support" the school board decision; burden of proof is on student to prove insufficiency of the evidence in support of the board's decision; ruling for school board); Boynton v. Casey, 543 F. Supp. 995, 1000-1001 (D.Me. 1982) (refusing to "reconsider...evidence" bearing upon an asserted violation of state expulsion statute).

(b.) "Sufficient Evidence"

An alternative formulation is "sufficient evidence." Support for the use of "sufficient evidence" as a somewhat different concept is found in Freeman v. Zahradnick, 429 U.S. 1111, 97 S.Ct. 1150 (1977) (Stewart J., dissenting from denial of certiorari). Justice Stewart argued that "sufficient evidence" allows the appeals body to review whether or not the hearing body had before it enough evidence to meet the requisite standard. For instance, where the hearing body can find the student guilty only if there is "clear and convincing evidence," the appeals body would reverse a finding of misconduct if it determined that no hearing body could reasonably have found, on the basis of the evidence before it, that there was clear and convincing evidence of misconduct. Thus, "sufficient evidence" can be more finely attuned to the lower hearing body's standard than can "substantial evidence," while still insuring that the appeals body only reviews the findings and does not substitute its own judgment of the evidence.

See also:

- Adams v. School Board of Brevard County, 470 So. 2d 760, 762 (Fla. Dist. Ct. App. 1985) (expulsion for remainder of year and summer session; "[R]ule and charges against these students require either some evidentiary basis to conclude that the pills were actually illegal or controlled substances (which proof was completely lacking), or alternatively, that the students held them out to be speed."; court determines there was "sufficient" evidence as to some students, and "insufficient" evidence as to others).

(c.) Other Formulations

A variety of other standards of review (and sometimes multiple standards) have been articulated.

- Crook v. Baker, 813 F. 2d 88, 100 (6th Cir. 1987) (conclusion that graduate student fabricated thesis data was "not arbitrary or capricious" and was, moreover, "supported by clear and convincing evidence"; court did not hold that this standard must be applied);
- Jones v. Brevard County School Board, 470 So. 2d 760 (Fla. Dist. Ct. App. 1985) (expulsion for remainder of year; drug charge supported by "evidence which the Board was free to believe..."; statutory standard applicable);
- Jones v. Board of Trustees of the Pascagoula Municipal Separate School District, 524 So. 2d 968, 971, 973 (Miss. 1988) (expulsion for a semester; "The evidence might have been conflicting, but the board had sufficient evidence to find this violation."; "there was substantial evidence"; constitutional standard);
- Napolitano v. Princeton University Trustees, 453 A.2d 263, 275 (N.J. Super. A.D. 1982) (withholding of degree for one year for plagiarism; trial judge not required to conduct a full hearing on facts; "He concluded, regardless whether he found the evidence sufficient, substantial or under any standard of evidence required, that the charge of plagiarism against plaintiff was proved".

(d.) Evidence Before the Hearing Body

The determination of substantial evidence (or sufficient evidence) must normally be based only upon the evidence that was before the hearing body.

See:

- Esteban v. Central Missouri State College, 277 F. Supp. 649, 652 (W.D. Mo. 1967), *approved*, 415 F.2d 1077 (8th Cir. 1979), *cert. denied*, 398 U.S. 965 (1970) (exclusion for two semesters);
- DeJesus v. Penberthy, 344 F. Supp. 70, 77 (D. Conn. 1972) (expulsion);
- Marzette v. McPhee, 294 F. Supp. 562, 567 (W.D. Wis. 1968) (suspension or expulsion).

See also:

- United States v. Carlo Bianchi & Co., 373 U.S. 709, 714-15, 83 S.Ct. 1409, 1413-14 (1963).

Further, in determining whether there was substantial (or sufficient) evidence, the reviewing body should determine whether there was substantial evidence to prove misconduct on the grounds actually relied upon by the hearing body, and not on grounds which might have been available to the hearing body but which were not in fact relied upon. DeJesus, *supra*, 344 F. Supp. 70, 76. See S.E.C. v. Chenery Corp., 318 U.S. 80, 95, 63 S.Ct. 454, 462 (1943) ("We merely hold that an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained.").

4. Review of the Penalty

In addition to reviewing whether there was sufficient evidence for the finding of misconduct, the appellate body should also assess whether the penalty is appropriate. Mills, *supra*, 348 F. Supp. 866, 883 (D.D.C. 1972). See Warren County Board of Education v. Wilkinson, 500 So. 2d 455, 461 (Miss. 1986) (loss of full credit for a semester for drinking two or three sips of beer at home before school; suggesting that cruel and unusual punishment clause of Mississippi Constitution places limits on school discipline). See §VI. of the Center's 1982 manual *School Discipline and Student Rights*, "Unreasonable, Excessive, or Unauthorized Rules or Punishment -- General Legal Concepts," for commentary concerning penalties which are so disproportionate to the offense as to be found arbitrary or unreasonable in violation of substantive due process or *ultra vires* when reviewed by an appellate or judicial body.

5. Review for Other Violations

Finally, the appeals body should review the record to determine whether any of the required procedures or any other rights were violated (including review of any challenges to the validity of the rules in question.) A useful set of criteria for review has been stated by a labor arbitrator in Grief Bros. Cooperage Corp., 42 Lab. Arb. (BNA) 555 (1964):

A "no" answer to any one or more of the following questions normally signifies that just and proper cause did not exist....

1. Did the company give the employee forewarning or foreknowledge of the possible or probable disciplinary consequences of the employee's conduct?
2. Was the company's rule or managerial order reasonably related to the orderly, efficient, and safe operation of the company's business?
3. Did the company, before administering discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management? ...
4. Was the company's investigation conducted fairly and objectively?
5. At the investigation did the "judge" obtain substantial evidence or proof that the employee was guilty as charged? ...
6. Has the company applied its rules, orders, and penalties evenhandedly and without discrimination to all employees? If the company has been lax in enforcing its rules and orders and decides henceforth to apply them rigorously, the company may avoid a finding of discrimination by telling all employees beforehand of its intent to enforce hereafter all rules as written.
7. Was the degree of discipline administered by the company in a particular case reasonably related to (a) the seriousness of the employee's proven offense and (b) the record of the employee in his service to the company? ... An employee's record of previous offenses may never be used to discover whether he was guilty of the immediate or latest one. The only proper use of his record is to help determine the severity of discipline once he has properly been found guilty of the immediate offense....

6. Modification of Penalty

There is some authority protecting the student against the increasing of a penalty on appeal. See Mills, *supra*, 348 F. Supp. 866, 883 (D.D.C. 1972) (appeals committee "shall determine the appropriateness of and may modify the such decision" but "in no event may such Committee impose added or more severe restrictions on the child"). Cf. Escobar v. State University, 427 F. Supp. 850 (E.D.N.Y. 1977) (denial of due process when, after discipline committee imposed a sentence following a hearing, president of the college stepped in, reviewed the record, and imposed a different punishment without complying with procedures formally established by the college).